FILE

No. 421

IN THE

Supreme Court of the United States

October Term, 1906

ROY HAZELTON, Administrator of the Estate of Charlotte Hazelton, Deceased,

Appellant & Petitioner,

vs.

CITY OF SAN DIEGO, a Municipal corporation, Councilmen of the City of San Diego, and the CITY OF CORONADO, a Municipal corporation, Citizen of the City of Coronado,

Appellees & Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT

MANUEL BLAIR
[illegible] Spring Street
Los Angeles, California

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THE CITY OF SAN DIEGO, a Municipal corporation, Councilmen of the City of San Diego, and the CITY OF CORONADO, a Municipal corporation, Councilmen of the City of Coronado,

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PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT

Lee Roy Hazelton, Administrator of the Estate of Charlotte Hazelton, deceased, on behalf of himself and other persons similarly situated, prays that a Writ of Certiorari issue to review the judgment of the District Court of Appeal of the State of California entered in the above entitled case, and permit appellant to prove the allegations of the complaint on file in the State Court, or for leave to further amend upon the claim asserted.

OPINIONS BELOW

The Opinion of said District Court of Appeal (hereinafter referred to as the California Court of Intermediate Appeals) reported at 183 A.C.A. 140, is set forth as Appendix "A" in this petition. 4th Civ. No. 6170) The final order of the Court of First Instance, i.e. Superior Court of the State of California, County of San Diego, is set forth as Appendix "B" of this petition.

JURISDICTION

The judgment of the California Court of Intermediate Appeals was entered on July 25, 1960. A timely petition for rehearing was filed but denied by said Court on August 19, 1960. A timely petition for hearing was filed in the California Supreme Court which was denied by said Court on September 14, 1960, without an opinion. The jurisdiction of this Court is invoked under 28 U.S.C.A. section 1257(3).

QUESTIONS PRESENTED

May petitioner be precluded in an action filed by her, by an arbitrary and unreasonable state court determination of the fact in issue "of colorable compliance" at the pleading stage and upon demurrer, and thereby be denied a hearing on the merits concerning void annexations by a Municipal Corporation affecting her property, when said annexations have been conducted by said city, not only in violation of state law, but in violation of the United States Constitution.

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

Constitution of the United States, Art. I, Sec. VIII (17):

"To exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may, by cession of particular States and the acceptance of Congress, become the seat of the Government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings; and . . ."

Constitution of the United States, Art. VI, Sec. 2:

"This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

Amendment XIV, section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law;

nor deny to any person within its jurisdiction the equal protection of the laws."

Ordinance 6222, City of San Diego, dated August 10, 1954. (See Appendix "C").

California Government Code, Sec. 35104:

"To qualify for annexation, new territory shall be contiguous to: (a) The city, or (b) Contiguous territory where the electors have voted for annexation to the city."

STATEMENT OF THE CASE

Petitioner, on behalf of said petitioner and other persons similarly situated, requested leave to sue in quo warranto, with the California State Attorney General, to bring Appellee municipal corporation, City of San Diego, herein, before the State Courts, to show by what authority it claimed jurisdiction to tax and control for other municipal purposes, an area adjacent to the International Boundary with Mexico, referred to as the "South Bay", wherein petitioner resided, owned property, and was a taxpayer.

The Attorney General first granted provisional leave to sue and then denied leave to sue in quo warranto on February 3, 1958, whereupon petition for Writ of Mandate was then filed by Petitioner to compel the Attorney General to grant leave to sue. (4th Civil 5883, Transcript herein of record California Court of Intermediate Appeals). Petition for mandate was denied on April 29th, 1958, without an opinion, and a petition for hearing in the California Supreme Court was denied on June 25, 1958, without an opinion.

On December 26, 1958, petitioner filed a petition for Writ of Certiorari, in the California Courts which after one amendment, demurrer to said petition was sustained without leave to further amend, and the California Courts refused to allow a hearing on the merits, with respect to municipal action done to accomplish an unlawful end, upon petitioner's allegations that the unilateral determinations of the State Attorney General were arbitrary, indefensible and did not accord petitioner her constitutional rights. It is requested by petitioner that the Supreme Court of the United States permit Appellant to prove the allegations of her complaint, or for leave to further amend upon the claim asserted therein.

It has been conceded by the State Attorney General of California in the matter at bar, "Opinion #57-154-Feb. 3, 1958" (4th Civil No. 5883) (published in 31 Opinions Attorney General California 55 and made a part hereof as Appendix "E") Exhibit II, as part of the record before the California Supreme Court, in denying petitioner request to sue in quo warranto, as follows:

> "Petitioner's original petition attempted to state causes of action . . . upon the grounds that the . . . were void annexations . . ."

The acts which violated the 14th Amendment and deprived petitioner of due process of law and which constituted a void assumption of municipal jurisdiction, were called to the attention of the California State Court of Intermediate Appeals under the heading of "The Three Annexations should be considered as one fraudulent attempt to obtain a water corridor and territory in the South Bay" (Reply Brief by Pe-

tioner, pgs. 1-12, 4th Civil No. 6170). (Also page 3, appellant's petition for rehearing, 4th Civil No. 6170).

REASONS FOR GRANTING THE WRIT

THE STATE LAW DID NOT PROVIDE ADEQUATE NOTICE AND OPPORTUNITY TO ENABLE PETITIONER'S TO DEFEND THEIR PROPERTIES AND LIBERTIES FROM A VOID ASSUMPTION OF MUNICIPAL JURISDICTION BY APPELLEE CITY OF SAN DIEGO, AND THERE IS AN IMPELLING NEED FOR A DETERMINATION OF THE IMPORTANT QUESTION OF CONSTITUTIONAL LAW, I.E. WHAT NOTICE IS NECESSARY WHICH IS REASONABLY CALCULATED TO INFORM PARTIES OF PROCEEDINGS WHICH MAY DIRECTLY AND ADVERSELY AFFECT THEIR LEGALLY PROTECTED INTERESTS.

UNDER THE CIRCUMSTANCES, IN THE CASE AT BAR, UNCERTAINTY HAS CREATED RELATIVE TO MUNICIPAL BONDED INDEBTEDNESS, FUTURE MUNICPAL BOND ISSUES, VALIDITY OF MUNICIPAL ORDINANCES, ZONING RESTRICTIONS, PAYMENT OF TAXES BY RESIDENTS OF ALLEGEDLY ANNEXED AREAS, AND OBLIGATIONS WITH THE GOVERNMENT OF THE UNITED STATES, WHICH IF NOT SETTLED WILL OCCASION MULTIPLE ACTIONS.

The Supreme Court of the United States, in the case of *Ocean Beach Heights, Inc. vs Brown-Crummer Inv. Co.*, 58 Sup. Ct. 385, considered the question post facto of municipal bonds which had been issued in a case of a non-contiguous annexation, contrary to the requirement that there be contiguity, as in the case at bar. The town (assuming it had validly incorporated both sides of a Bay) had issued bonds to the

extent of $280,000.00. On hearing in the Supreme Court, the judgment of the Court below was reversed with instruction to limit its effect to the west side only "as the east side lands never became liable to be taxed by the town to pay its bonds", even tho acquiesced in by the owners of land on the "eastside."

Said the Supreme Court, at page 387:

> "The town de jure could not be made to include the east side. Mere inspection of the statute and the defined boundaries unmistakably shows that the west side electors were without authority to incorporate the east side tract with that in which they resided. *Unquestionably, these were detached tracts within the meaning of the statute*". (our italics)

The area in the case at bar was a detached tract non-contiguous to the City of San Diego, within the meaning of the state statute.* The edifice of two annexations, latter of which affected appellants liberties and properties, was based upon this detached water strip annexation herein referred to as Municipal Ordinance No. 6222, which if void must of necessity cause the entire edifice of said interdependent annexations to tumble. Said water strip annexation is described as the "San Diego Harbor Tidelands" and often referred to in the record as the water corridor annexation.

The blue print of said series of annexations was proclaimed by resolution No. 115920 of the City of

* *California Government Code, Sec.* 35104:

"To qualify for annexation, new territory shall be contiguous to: (2) The city, or (b) Contiguous territory where the electors have voted for annexation tot the city."

San Diego adopted December 23, 1953, (Appendix "D") which resolution was not at any time published nor notice thereof given to any person, the only record of the same appears in the Clerk's Office of the said City of San Diego which cannot in any manner be construed as notice to persons residing out of the said city. The said City Council of the City of San Diego acted upon a petition presented by thirteen residents of the South Bay Area for the Annexation of said South Bay to the City of San Diego "if a link down San Diego Bay could be established" (31 Opinions Attorney General California, pg. 55) (Appendix "E").

Said resolution stated in response to said petition by said thirteen persons, as follows:

> "That this Council approves in principle the annexation to the City of San Diego of all of the unincorporated area of the Bay of San Diego, and herein and hereby directs the City Manager and City Attorney to institute the necessary procedures which will result in the incorporation of said unincorporated area of the bay as a part of the City of San Diego."

The first, or foundational proceedings of this single structure, upon which said edifice rested, i.e. Municipal Ordinance No. 6222 (Appendix "C") recited on its face that written notice of the annexation had been mailed to each person whom land within the territory proposed to be annexed was assessed, inclusive of the State Attorney General of the State of California, and that two publications of said notice were had in a newspaper of general circulation published in the cities of San Diego and Coronado, but not published in the South Bay area where appellant owned property

and resided, although there were newspapers of general circulation published locally, inclusive of the Bay Cities Press.

Said Municipal Ordinance No. 6222, which referred to the notices shows that the notices did not contain a description of the territory to be annexed, and only referred to a resolution, copy of which resolution did not appear in the said referred to notices, nor did the Ordinance divulge the fact that it constituted part or parcel of three interdependent annexations, already blue printed and decided upon, in the architectural plans of the whole proceedings.

Said Municipal Ordinance No. 6222 restricted itself ostensibly to a water area in the Pacific Ocean, San Diego Bay, which is uninhabited, and to whosoever no property is assessed, and notice of intended annexation could not possibly have been deemed notice to any human being resident of the area, unless it referred to the denizens of the deep waters of the ocean. The notices were not directed to appellant, residents of the South Bay area who resided, many miles away, and as to them did not comply with due process of law. Even tho the purpose of said ordinance as pleaded below was, and subsequent events confirmed, part of an entire proceedings, to annex said area illegally as hereafter set forth.

No notice reasonably calculated to inform parties of proceedings which might directly and adversely affect their legally protected interests was given. (*Covey vs. Town of Somers*, 351 U. S. 141; *City of New York vs New York*, 344 U. S. 293; *Mullane vs. Central Hanover Bank*, 339 U. S. 306, 314-315; *Walker vs.*

City of Hutchinson, 352 U. S. 113 (See Ordinance 6222, Appendix "C").

After time to protest had lapsed said Ordinance 6222 was prefunctorily passed by the Municipal Corporation of the City of San Diego, and annexation of a detached area, as hereinafter specified, became an accomplished fact on August 10, 1954.

Said Ordinance set forth in full hereunder, recited that no protests were filed against the proposed annexation, and in all of its recitals, inclusive of its title and preamble, it advised that the subject matter of the annexation related to SAN DIEGO HARBOR TIDELANDS. (Appendix "C")

To an informed citizenry which would be responsive to said notice, SAN DIEGO HARBOR TIDELANDS could have but one meaning i.e. only those portions of land along the shore line which were submerged at high tide and exposed at low tide.

Referring to the definition of "tide lands" wherein the California State Supreme Court described them as "those portions of land along the shore line which were submerged at high tide and exposed at low tide", said Court said:

> "In their natural state, these tidelands were apparently of little value for any purpose, and were obviously of little value for navigation or commerce because of the relatively shallow water which covered them even when the tides were at their highest."
>
> *Mallon v. City of Long Beach*, 144 Cal.(2) 199, 213 infra, 214 supra.

The notice excepted to upon federal grounds herein, further recited that because the tidelands referred to were within the boundaries of the City of Coronado and had been also annexed by the City of Chula Vista, some of the tidelands were eliminated, and another resolution was passed by the Municipal Corporation of San Diego, upon the annexation of said tidelands".

After said Municipal Ordinance was passed and it was too late to lodge protests to its passage, it did not occur to, nor would it be within the contemplation of an informed person owning property wherein Appellant resided as herein specified, to suspect that the detailed metes and bounds description which were publicly published for the first time of the area already affected, would consist of an area other than that of San Diego Harbor Tidelands. The area annexed, thereby, consisted of a strip of water in navigable waters in the middle of San Diego Bay, six miles long and approximately 300 feet wide, without contiguity to the City of San Diego.

Thereupon the municipal corporation of San Diego annexed the South Bay area, pursuant to resolution of intention (pg. 10, para. VIII, Cl. Trans. 4th Civil No. 6170) wherein Appellant resided and owned property, by claiming it was contiguous to the Western Salt Company Tract annexation, (pg. 10 Cl's. Trans., para. IX, 4th Civil No. 6170). Said Western Salt Company Tract annexation, or second proceedings of annexation, constituted an extension of the void San Diego Harbor non-contiguous so called Tidelands annexation. The sole owner of the area of land encompassed in said second proceedings had consented to having his property annexed as uninhabited territory

to the southern tip of said void San Diego Harbor Tidelands annexation, at which point, after going around two cities by water, the City of San Diego came ashore! (See pleadings of appellant, Cl. Tr., para. XI, (1) (2) (3) (4) (5) (6), page 10, lines 25-32, page 11, Lines 1-30; 4th Civil No. 6170.)

Mere inspection of the statute and the defined boundaries in the case at bar, as well as the map, (4th Civil No. 5883, Exh. IV) filed before the Supreme Court as part of the record herein, indicates that the properties are detached tracts, non-contiguous to the Appellee City of San Diego, and no one under such circumstances should be compelled to rely upon mere refusal of the Attorney General to permit institution of legal proceedings which would determine for all time the fundamental rights of the parties, contrary to due process of law, and the *authority* of Appellee municipal corporation of San Diego in the first instance.

> "When a state power is used to circumvent a federally protected right, even in the matters concerning municipal boundaries, State Municipal manipulation, is restrained."
>
> *Gomillion v. Lightfoot*, 5 L. Ed. (2) 110, Dec. 5, 1960.

On August 7, 1957, approximately five weeks before September 13, 1957, when the City of San Diego filed its third proceedings of annexation directly affecting Appellant's property with the Secretary of State, Appellant and the City of Imperial Beach, requested the California Attorney General to sue the City of San Diego in quo warranto to test the validity of the annexations as one transaction, illegally divided

into three proceedings, to procure a non-contiguous fraudulent water corridor and territory into the South Bay area. The Attorney General delayed action on the timely objections, so on December 12, 1957, it was called to his attention that action must be commenced by him immediately under *California Code of Civil Procedure*, Section 349½, or the three months statute of limitation would run. Provisional leave to sue was thereupon granted on December 12, 1957, being the last day of the three months statutory limit, and on the same date quo warranto in relation of applicant, City of Imperial Beach and others was then and there filed in the Superior Court in and for the County of San Diego as quo warranto action No. 220773 and 220809*, files of said Court. (Cl. Tr., page 8, para. VII, 4th Civil No. 6170). Both of said actions were dismissed by the Attorney General before issue by answer.

On *February 3rd*, 1958, the Attorney General of California, who had theretofore given provisional leave to sue; arbitrarily reversed his stand and denied leave to sue the City of San Diego, in quo warranto, to determine the right of said City to exercise control over the three interdependent annexations, and gave as a ground for denial that the application for leave to sue was not filed until almost three years after the completion of the annexation of the San Diego Harbor Tidelands Annexation, and over two years after the completion of the Western Salt Com-

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* 2 actions in quo warranto:

220774—State of Calif. by Atty. Gen. Brown on relation of Imperial Beach. filed 12-12-57.

220809—State of Calif. by Atty. Gen. Brown only. filed 12-13-57.

pany Tract Annexation. (31 A. G. Op., pp. 55, 56) (Appendix "E")

Appellant for the first time became an aggrieved party to the proceedings or happenings above set forth, upon a question of his constitutional rights, and made an issue of and concerning the illegal and void water strip annexation, upon which the validity of the annexation affecting his property depended, and thereupon attacked the validity of said strip annexation. Action on part of Appellant prior thereto would have been premature.

The determination of the State Attorney General appears in the following language:

> "Leave to sue is denied as of all three of the San Diego annexations. Provisional leave to sue heretofore granted pursuant to the provisions of Section 10, title 11 of the California Administrative Code concerning the South Bay annexation is hereby withdrawn. Applicant City of Imperial Beach is directed to dismiss the complaint filed December 13, 1957, in San Diego County".

The Supreme Court of the State of California did not dispose of the application of petitioner to compel leave to sue in quo warranto, upon petition for writ of mandate sought by petitioners until June 25th, 1958, when said petition for mandate was denied without opinion by said Supreme Court.

It is submitted, that the above series of steps rooted in design, without due process, have as well rendered nugatory, by purposeful discrimination in the application of the law, all efforts advanced by the segment of citizens, represented in the case at bar, within the

framework of state law, as to deny them the equal protection of the law as specified with particularity herein. That the withholding of procedural action upon the part of the state Attorney General, being the allegedly sole remedy given to appellants, until outlawed by a 90 days statute of limitations deprived appellant of the equal protection of the laws in addition to the inadequate notice in violation of due process of law. (hereinabove related)

2. THE PETITION COMPELS A DETERMINATION OF THE IMPORTANT QUESTION OF CONSTITUTIONAL LAW AS TO WHETHER THE UNITED STATES SUPREME COURT UNDER TH. CIRCUMSTANCES IN THE CASE AT BAR MA' INVOKE ITS JUDGMENT TO EXAMINE PLEADINGS TO WHICH A DEMURRER HAS BEEN SUSTAINED WITHOUT LEAVE TO AMEND, AND WHEREIN A STATE COURT HAS BY FINALITY OF JUDGMENT BASED ITS DECISION ON NON-FEDERAL GROUNDS WHICH HAS RESULTED IN THE EVASION OF A CONSTITUTIONAL ISSUE AND WHETHER THE UNITED STATES SUPREME COURT MAY REMAND TO THE STATE COURT TO PERMIT PETITIONER TO ASSERT AND PROTECT HER CONSTITUTIONAL RIGHTS.

If there are facts which could be presumably pleaded within the framework of the claims and conclusions pleaded by Applicant before the State Court in violation of appellant's fundamental rights, the Supreme Court may give relief and the State Court cannot preclude appellant from proceeding to trial thereon or from amending her complaint to plead appel-

lant's claim of violation of her rights under the Constitution of the United States.

Brooklyn Savings Bank vs. O'Neil, 324 U. S. 697, 703.

Merchant's Nat'l Bank vs. Richmond, 256 U. S. 635, 638.

When the State Court shall in the process of deciding a case on non-federal grounds unreasonably enunciate a doctrine of colorable compliance, or an unreasonable conclusive presumption, or shall unreasonably take judicial notice of facts determinative of the case at issue, without providing an opportunity to refute or contradict such issue sought to be made conclusive, and, that such doctrine is a pretext for dispensing with a trial, such action will be determined by the Supreme Court as arbitrary, and the denial of a fair opportunity to repel or refute in the premises, violates the due process clause of the 14th amendment.

Ohio Bell Tel. Co. vs Commission, 301 U. S. 292.

The State Court of Intermediate Appeals declared that petitioner for certiorari could not ask for a review, as the word of the Attorney General was final and "none but the State could call its existence in question, that the petitioner had exhausted her legal remedy."

It was conceded by all parties that a de facto existence of municipal jurisdiction could not be predicated upon prohibited or unauthorized proceedings in law, since neither the passage of time nor the

exercise of municipal functions could create such a de facto existence.

Reference to the petition for certiorari filed by Petitioner in the State Court, shows that petitioner alleged that the proceedings conducted by the City of San Diego were prohibited or unauthorized by law. (Cl. Tr. 4th Civil No. 6170, pp. 7 & 8) In the stage of a general demurrer, i.e. mere pleadings stage, wherein matters charged in a complaint are admitted as true, the arbitrariness of the determination by the California Court of Intermediate Appeals appears in the following language:

> "Suffice it to say that there was a colorable attempt to comply with the annexation statutes . . . we are inclined to feel that all of the annexation proceedings were in compliance with the law . . . there is no showing that the proceedings conducted by the City of San Diego were prohibited or unauthorized in law." (Appendix "A")

Appellant's pleadings on file before the State Court affirmatively allege that the proceedings of the City of San Diego were prohibited or unauthorized by law; paragraphs VII, VIII and IX thereof, allege the following: (Cl. Tr. pg. 8, lines 12-29, 4th Civ. No. 6170)

> ". . . The Attorney General denied leave to sue . . . Writ of Mandamus in the Supreme Court of the State of California . . . was denied . . . the the only recourse open to plaintiff is this petition for writ of certiorari, which is the proper legal remedy to attack an alleged void annexation proceeding . . . and also to attack improper and illegal assessment of taxes".

In paragraph XII of said pleading, the following appears: (Cl. Tr. pg. 12, lines 1-6, 4th Civ. No. 6170)

> "Plaintiff, Charlotte Hazelton, is merely one of several persons subject to said unconstitutional taxes and assessments because of the alleged annexation, which annexation depends for its validity upon the 1954 'Water Corridor' annexation involving a strip of tidelands and navigable water of San Diego Bay".

Paragraph VII of Appellant's amendment to Petition for Writ of Certiorari (Cl. Tr., page 24, 4th Civ. No. 6170) refers to and identifies Ordinance No. 6222 hereinabove identified of the City of San Diego passed on August 10th, 1954, as the basis of said Municipal Corporation's government control of the area involved.

In paragraph XI (6) of her complaint, she alleged as follows: (Cl. Tr., pg. 11, lines 27 through 30, 4th Civil No. 6170)

> "Plaintiff's property has been subject to illegal, invalid and void assessment because it is located in an area over which the said City of San Diego illegally, erroneously and unconstitutionally claims the right to levy taxes and assessments."

The California Court of Intermediate Appeals, in excess of its powers, purported to render a final judgment. (Appendix "A") and establish a rule of law clearly inapplicable to the allegations of the petition before the State Court. The inapplicability of the rule of law established by the Opinion of the Court, to the claims of petitioner in the case at bar is in substance admitted by the California Attorney General, wherein said Attorney General of Cali-

fornia, in Opinions 31 Ops. Atty. Gen. 55 (Appendix "E", pg. 21e) concedes that *C.C.P.* 349½, which announces the statutory period of three months within which to contest completed annexation proceedings, does not apply to cases involving an annexation where the territory annexed was many miles from the annexing city, with absolutely no connecting link. The Attorney General of California stated in said Opinion; relative to territory annexed many miles from the annexing city, that "there is doubt whether *Code of Civil Procedure* section 349½ would be held to cure the lack of contiguity". (Appendix "E", pg. 16 infra of said Opinion).

The only matter which the State Attorney General does not concede in the case on appeal is the factual question of whether there is or there is no connecting link between the annexing City of San Diego, and the area sought to be annexed which admittedly is a territory many miles from the annexing city. This factual question was resolved contrary to Appellant's contention at the pleading stage, without a hearing or trial on the merits, or one which complied with due process of law even though the prima facie claim was stated that the annexation proceedings were void.

> "If facts setting up a federal right in the pleadings are demurred to and the matter proceeds to judgment, the Supreme Court is at full liberty to consider the facts alleged in the complaint."
>
> *Boyd vs. State of Nebraska*, 143 U.S. 135.
> *Postal vs. City of Newport*, 247 U.S. 464.

> "Since the petitioner claims denial of his rights under the Federal Constitution, the U. S. Su-

preme Court was not bound by the factual conclusion reached by the Illinois Supreme Court, but may re-examine the conclusion".

Napue v. Illinois, 360 U. S. 264.

Justice Holmes, writing for the Court, which reversed the Court of Appeals of Missouri, which denied a writ of certiorari upon the grounds of local practice, in the case of *Davis vs. Wechsler*, 263 U. S. 22, 24, said:

> "If the Constitution and laws of the United States are to be enforced, this Court cannot accept as final the decision of a State tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds."

In *Niemotko v. Maryland*, 340 U. S. 268, 270, 271, the Court said, upon denial of the Maryland Court to take the case on certiorari because the issues were not "matters of public interest":

> "In cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound 'by the conclusions of lower courts'."

THE PROCEEDINGS CONDUCTED BY THE CITY OF SAN DIEGO WERE PROHIBITED AND UNAUTHORIZED BY ARTICLE I, SECTION 8 (17) OF THE UNITED STATES CONSTITUTION.

Writ of review filed by applicant attacked an allegedly unauthorized and prohibited annexation by a Municipal Corporation, as void, that neither the passage of time nor the transient and temporary ex-

ercise of Municipal functions could make a void annexation valid.

Appellees and State Courts, in the case at bar, have contended that since the annexations have been procedurally completed and the Municipal Corporation's attempts were "colorable" attempts to comply, that appellants remedy in quo warranto, which was denied her, by the State Attorney General, has exhausted appellant's legal remedies.

"Petition of hearing", in the Supreme Court of the State of California, pg. 26, reiterated specifically the claim of appellant "that since the Tidelands annexation is not contiguous to the City of San Diego, it is therefore void".

Exhibit "IV" of Appellant's Petition for Writ of Mandamus Volume II, Exhibits, 4th Civ. No. 5883 herein refers to a map of San Diego Bay. Between the City of San Diego and the area wherein contiguity is proposed for the territory sought to be annexed, is an area which reads "U. S. Naval Repair Base". A prolongation of said line through the said Base, across the Bay to the City of Coronado, is the line which purportedly forms the base or contiguity of the San Diego Water Corridor Annexation. With regard to said line, Robert Henrich, Engineer for the San Diego County Boundary Commission reported, at its duly convened meeting of January 5, 1954, with regard to said water corridor annexation: "It precludes any contiguity except at a point, which is not sufficient."

The basis for said conclusion of said Mr. Henrich was obvious, in that it assumed that San Diego could prolong its southern boundary through territory ex-

clusively within the jurisdiction of the Federal Government and beyond into the Bay and to the City of Coronado, at which point it could do no more than circle the City of Coronado, which is a peninsula and does not form a connection at any point with the City of San Diego, or if further prolonged would not reach any point or other boundary of the City of San Diego under any circumstance whatever. (make reference to map, 4th Civil 5883, Ex. IV)

The California Court of Intermediate Appeals (Appendix "A"), in declaring that petitioner's claim consisted of conclusions and deprived her of the right to amend, has prevented the determination that the Municipal Corporation of San Diego assumed political jurisdiction contrary to Article I, Section 8 (17) of the United States Constitution, over an area where exclusive legislative jurisdiction was in the Congress of the United States.

In Paragraph VII of said pleadings (4th Civil No. 6170, Page 5, Cl. Tr., page 24), it is alleged as follows, in connection with a claim of Municipal jurisdiction to the water area involved and which appellant claims to be under exclusive Congressional legislative jurisdiction:

> "An inspection of the map of San Diego Bay shows the patent absurdity of such a claim as to (City) governmental control . ... to attempt to provide contiguity to land areas in the South Bay Area."

In paragraph VI of said pleadings, the following appears: (4th Civil No. 6170, Cl. Tr., pg. 8, lines 4 to 9)

"The defendant . . . City of San Diego . . . is exercising jurisdiction over said territories".

In paragraph III of appellant's amendment to Petition for Writ of Certiorari (4th Civil No. 6170, Cl. Tr., pg. 23, lines 15-19), it is alleged:

". . . since the 'Water Corridor' cannot therefore be a part of the City of San Diego, the subsequent attempted annexation . . . South Bay annexation . . . void for lack of jurisdiction . . ."

It is patent from the map (4th Civil No. 5883, Ex. IV) that the water corridor annexation does not border the City of San Diego as admittedly required.

The point or line to which said water corridor (San Diego Harbor Tidelands) annexation purportedly connects is an extension from the City of San Diego through the United States Naval Repair Base (map, Ex. IV, 4th Civil No. 5883) which base was purchased by the United States with the consent of the California Legislature within the provisions of Article I, Section 8 (17) of the United States Constitution. The political jurisdiction of the City of San Diego, the State of California and the Legislative Jurisdiction of the Congress of the United States within the said area have by said state court decision become inconsistent and contradictory.

It is clear from the reading of the decision of the State Court, and the decision of the Attorney General upon which it is based, and the allegations in support of appellant's claim, that the issues in the case at bar, if permitted to proceed to a hearing and trial upon the merits, what appears to be a conflict of political jurisdiction between the Federal and State Government can be determined, and political overlapping

eliminated in accordance with law and fact and after due consideration.

However, the said California State Court by its summary decision in the premises, and by granting conclusive weight to the opinion of the Attorney General with regard to the unilateral San Diego Harbor Tidelands Annexation of the City of San Diego, has sought to by inaction to establish as de facto and thereby indisputably within the City of San Diego, territory which cannot by the passage of time or acquiesance become a part thereof, by reason of null and void annexation proceedings which lack contiguity, and territory which is within the exclusive jurisdiction of the United States.

The case of *Ex-Parte Tatem*, 23 Fed. Case 708 (Case No. 13759 E. D. Va. 1877) under the Virginia Cession statute, it was held that the term Navy Yard, "Meant not merely the land on which the government does work connected with ships of the Navy, but the waters contiguous necessary to float the vessels while at the Navy Yard".

The California State Legislature contemplated, and consented to the establishment of legislative jurisdiction by the Federal Government in said area, in Act 6881, conveyance of tidelands . . . to the City of San Diego (Stats. 1911, page 1337, etc., Statutes 1943, Ch. 70), pertinent portion of which reads as follows:

> "to the City of San Diego . . . all of the lands situate on the City of San Diego side of said bay, lying and being between the line of mean high tide and the pier head line in said bay, 'as the same has been or may hereafter be established by the Federal Government' . . ."

Also cession statutes of the State of California are found in Appendix "F". Additional parcels of land have been continuously acquired by the Federal Government with the consent of the California legislature, both by purchase and legislative act, extending into what is purportedly San Diego and National City upon the boundary line in dispute and the area which is marked "U. S. Naval Repair Base" (Map, Ex. IV, 4th Civ. No. 5883), to which reference in detail would only consume needless printing and space.

The conveyance thus made, subject to Federal Government jurisdiction, specifically describes land on the City side of said Bay from the "boundary line between the City of San Diego and National City, and the 'prolongation' into the Bay of San Diego *to the pier head line* of the northerly line of the United States Military reservation of Point Loma".

It is clear that the legislative grant of California that the tidelands up to the pier head on the City side of the Bay to the Military Reservation on Point Loma, located at N 8° 04 12 W" 498.14, described and restricted the conveyance to a ribbon of water adjacent to the inner Bay on the City side of San Diego, and not across or into the Bay of San Diego.

The California State legislature was mindful of the fact that any alleged claim of the City of San Diego to the San Diego Bay area, on its southern boundary, across the Bay to the Pacific Ocean, was void, in that said State Legislature in its General Law, Acts 1702-1704, Statutes 1923 Amended Stats. 1929 et. Statutes 1949, Ch. 1013, amendment of 1949, in granting the use of tidelands and submerged land to the City of Coronado, another Municipal Corpora-

tion, and appellee herein located in the middle of San Diego Bay, specifically referred to the fact that said baylands were located in the *County of San Diego*. Thus, pertinent portion of the grant reads as follows:

> "There is hereby granted and conveyed to the City of Coronado, a municipal corporation in the County of San Diego, State of California . . . all tidelands and submerged lands (whether filled or unfilled), and situated upon the Coronado side of the Bay of San Diego, *in the County of San Diego*, State of California, lying between the line of mean high tide and the pierhead line in said bay, as said pierhead line has been or may hereafter be established by the Federal Government, and between the prolongation of the easterly boundary line of the City of Coronado into Glorietta Bay, a portion of said San Diego Bay, and the prolongation of the westerly boundary line of said City of Coronado into Spanish Bight, a portion of said San Diego Bay."

The area where the alleged southern municipal limits of the City of San Diego attached to the fictitious water corridor, over which the Municipal Corporation had no jurisdiction, had been detached by State Legislative action and Municipal conduct, prior thereto, de facto if not de jure, and at the commencement of the annexation proceedings, validity of which the annexation of the South Bay Area depends in the case at bar, there was no contiguity to the City of San Diego, either by sea, or land! The so called contiguous area was not subject to the exercise of the legislative discretion of said appellee Municipal Corporation and any doctrine of colorable compliance under the cir-

cumstances here delineated has invoked a federal question under the U. S. Constitution where ordinarily a state question only would be presented, under the inhibition of the Federal Constitution concerning the exclusive legislative powers of the Federal Congress.

With regard to Appellee City of Coronado, Appellant was denied a hearing upon the following allegations of the complaint before the state court (Cl. Tr., pg. 22, lines 1-10, 4th Civ. No. 6170):

> "That prior to the attempted annexation by the City of San Diego of the 'Water Corridor' on June 25th, 1954, in Resolution No. 2485 of the City of Coronado, California, entitled: 'A Resolution Consenting to the Withdrawal of Territory from the City of Coronado' (which purported to consent to the detachment from the City of Coronado the area involved in the 'Water Corridor' annexation), only two councilmen voted 'Aye', one voted 'Nay' and two were absent, copy thereof is attached as Exhibit III. The council meeting on June 25th, 1954, was on a Friday afternoon and was a special meeting and not a regularly scheduled meeting."

Appellant continued with the following allegations set forth specifically in her complaint before the state court (Cl. Tr., pg. 23, lines 4-19, 4th Civ. No. 6170):

> "Plaintiff further alleges on information and belief that prior to the special meeting called on June 24, 1954, each member did not receive written notice at least three hours before the meeting or did not give their written consent in writing as required by section 36806 of the Government Code. Accordingly all proceedings of the special

meeting, which consisted solely of the passage of the aforementioned resolution are void for want of proper notice. Accordingly, it is complained that the 'Water Corridor' was not legally annexed by the City of San Diego, because the City of Coronado did not legally consent to its detachment by resolution as required by law. Therefore, the City of San Diego does not have jurisdiction. Further, since the 'Water Corridor' cannot therefore be a part of the City of San Diego, the subsequent attempted annexation of the Western Salt Company and the San Diego-South Bay Annexation are void for lack of jurisdiction because of a failure of contiguity."

IN CONCLUSION

The attempted exercise of state and municipal jurisdiction over an area which by express provisions of the United States Constitution was lodged exclusively in Congress, and an attempted use of said place for contiguity purposes for a water annexation approximately 300 feet wide and six miles long, to go around two cities and annex an area which is inaccessible and 6 miles distant by land to the purported annexing city, was not only a void proceedings and contrary to the spirit and objectives of the California law concerning the subject of annexations, but its invalidity is compounded, when a state in controlling its' internal affairs has devised legal procedure which effectively prevents a hearing on the merits to ascertain invalidity under State law; and, the same procedure effectively restrains a hearing upon issues

which arise or may arise under the constitution of the United States.

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted.

MANUEL RUIZ, JR.
Attorney for Petitioner

ALEXANDER RUIZ
OF COUNSEL

APPENDIX "A"

OPINION

4th Civil No. 6170

APPEAL from a judgment of the Superior Court of San Diego County. Bonsall Noon, Judge. Affirmed.

F. James Bear and Richards, Bartell, Rodgers & Stewart for Appellant.

J. F. DuPaul, City Attorney, and Alan M. Firestone, Chief Deputy, for Respondent The City of San Diego.

John R. Goodbody, City Attorney, for Respondent The City of Coronado.

This is an appeal from a judgment entered after demurrer to petition was sustained without leave to amend. In her original petition for Writ of Certiorari, petitioner, appellant herein, sued as a citizen and taxpayer, naming the City of San Diego and individual members of the city council as defendants. The petition was filed on December 26, 1958.

The petition alleges: The City of San Diego, a municipal corporation, has attempted to annex to the city a strip consisting of a "water corridor" in the middle of San Diego Bay, as uninhabited territory; this annexation was completed by filing the approving ordinance with the Secretary of State on September 15, 1954; the territory annexed is a strip six miles long and 600 feet wide, the entire surface of which is water area within the San Diego Bay. (Although the petition alleges the strip to be 600 feet wide, it is con-

ceded in the briefs that the strip as annexed was actually 300 feet wide.) This annexation is hereinafter referred to as the "Tidelands Annexation".

Then as uninhabited territory, defendants annexed the Western Salt Company Tract, which annexation was completed on April 25, 1955. This annexation is contiguous to the southernmost end of the Tidelands Annexation. The Western Salt Company annexation consists of about 750 acres within which is located a plant for the extraction of salt. None of the property is owned by the city of San Diego, and the city of San Diego has made no improvement within the area since the annexation. It is then alleged that the purpose of the Tidelands Annexation was to provide "fictitious contiguity" from the former boundary of the city of San Diego to the Western Salt Company Tract.

It is next alleged that petitioner and others petitioned the attorney general of the state of California for leave to sue in quo warranto to have the annexations declared invalid. The attorney general denied leave to sue on February 3, 1958. A petition for Writ of Mandate was then filed to compel the attorney general to grant leave to sue. This petition was denied by this court on April 29, 1958, and a petition for hearing in the Supreme Court was denied on June 27, 1958.

In her second cause of action, petitioner realleges the facts pertaining to the Tidelands Annexation, and then alleges that on December 18, 1956, a petition was filed with the city of Imperial Beach for the annexation of certain territory to that city. On January 15, 1957, the city council of Imperial Beach passed

a resolution approving the circulation of a petition for the annexation of this territory. On April 2, 1957, a petition signed by qualified electors within the area proposed for annexation was filed with the city, and the city council of Imperial Beach passed a resolution of intention to call a special election for annexation. On April 11, 1957, the city clerk of the city of Imperial Beach found that the signatures on the petition were insufficient. On April 18, 1957, a supplemental petition was filed and the city clerk certified the signatures on the petition and the supplemental petition to be sufficient.

On March 7, 1957, a petition was filed with the city council of the city of San Diego to annex certain territory to the city of San Diego. This annexation is hereinafter referred to as the "South Bay Annexation". On March 20, 1957, the city council of San Diego passed a resolution of intention to annex the South Bay area. Approximately one-half of the area included within the South Bay Annexation is within the area of the Imperial Beach annexation. On April 15, 1957, while the Imperial Beach annexation was still pending before the city council of Imperial Beach, the city council of San Diego passed a resolution of intention to call a special election for the annexation of the South Bay area. (Although it is not alleged in the petition, it is conceded in the briefs that in this election the voters in the South Bay area approved, by a substantial majority, the annexation of this area to the city of San Diego. It also is conceded that the Imperial Beach annexation failed because of the protests of a majority of property owners).

The petition thereafter alleges several reasons,

which are legal conclusions and argument, why the San Diego annexations are void.

The city of San Diego demurred to the petition on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained, and the petitioner was given 20 days to amend. The petitioner then filed a document entitled, "An Amendment to Petition for Writ of Certiorari—Writ of Review". In this document petitioner alleged "a further and third cause of action", and named the city of Coronado and its city council as additional defendants. After realleging the facts concerning the Tidelands Annexation, the facts as alleged in the amendment to the petition are as follows: On June 25, 1954, at a special meeting of the city council of the city of Coronado, with three of the five councilmen present, a resolution was passed consenting to the withdrawal of territory from the city of Coronado. The area withdrawn was area included within the Tidelands Annexation. The resolution was passed by a 2 to 1 vote. The members of the Coronado city council did not receive written notice at least three hours before the special meeting, and they did not give their written consent to the meeting. Petitioner then alleges that she is a citizen and taxpayer within the South Bay area and that she is one of several persons subject to illegal taxes and assessments levied by the city of San Diego because of these annexations. She again alleges legal conclusions and argument as to why the annexations are void.

It should be noted that petitioner's amendment to the petition for certiorari does not in any way alter or change the original petition to which a demurrer had previously been sustained. The purported amend-

ment merely alleges a further and third cause of action.

Demurrers were filed by both the city of San Diego and the city of Coronado. Both demurrers were sustained without leave to amend and a judgment of dismissal was entered. Petitioner appeals from that judgment.

Petitioner's prime contention is that the Tidelands Annexation, being the annexation of a strip 300 feet wide and five to six miles long in the middle of San Diego Bay, is not a "strip of land" such as is required by section 35002.5 of the Government Code to make the annexed territory contiguous; that since the Tidelands Annexation is not contiguous to the city of San Diego it is therefore void. She then contends that since the only contiguity for the Western Salt Company annexation is the void Tidelands Annexation, it, too, has no contiguity to the city of San Diego and is void; and that, in turn, the contiguity depended upon for the South Bay Annexation is the Tidelands Annexation and the Western Salt Company annexation and, since they are void, there is no contiguity to the city of San Diego for the South Bay annexation and it likewise is void.

There are several other points and arguments raised in the briefs. However, in view of our decision it will not be necessary to recite them further.

The facts show that the Tidelands Annexation was completed on September 15, 1954, the Western Salt Company annexation was completed on April 25, 1955, and the South Bay Annexation was completed on September 13, 1957. (Although this latter date is not alleged in the petition, it is set forth in the pe-

titioner's statement of facts in her opening brief and is conceded.) Thus, since September 13, 1957, these annexations have been procedurally completed, the area has been included within the city of San Diego and that city has exercised municipal dominion over the area.

Under these circumstances, will a Writ of Review lie to test the validity of the annexation proceeding? No.

Where the annexation proceedings have not been completed at the time an action is commenced to test their validity, a writ of review is available to a private citizen within the area. (*Miller & Lux v. Board of Supervisors*, 189 Cal. 254; *City of Anaheim v. City of Fullerton*, 102 Cal. App. 2d 395, 401; *County of San Mateo v. City of Palo Alto*, 168 Cal. App. 2d 220.) However, where, as here, the proceedings have been completed and the city has been and is exercising dominion over the territory annexed, the territory becomes incorporated within the city and a corporation de facto is created and "none but the State can call its existence in question". (*Tulare Irrigation Dist. v. Chepard*, 185 U. S. 1; 22 Sup. Ct. Rep. 531, 536.) A private individual has no legal capacity to attack the fixing or extension of municipal limits. His sole remedy is in quo warranto. (*Coe v. City of Los Angeles*, 42 Cal. App. 479; *Crowl v. Board of Trustees*, 109 Cal. App. 214; *Keech v. Joplin*, 157 Cal. 1, 14; 13 A.L.R. 2d 1279, 1284.)

The petitioner acknowledges this to be the general rule, but contends that a prohibited or unauthorized annexation is void and being void, no corporation de facto could result and neither the passage of time nor

the exercise of municipal functions could make it valid. However, in this case there is no showing that the proceedings conducted by the City of San Diego were prohibited or unauthorized in law. To the contrary, it would appear that the city attempted to comply with the annexation statutes in all of their proceedings. The petitioner's chief complaint is directed toward the manner in which it was done. Suffice it to say that there was a colorable attempt to comply with the annexation statutes and under the authorities cited above, the petitioner's only remedy is in quo warranto. Since this has previously been denied her, she has exhausted her legal remedy.

In regard to petitioner's contention that certiorari should lie because the annexations were allegedly void, it should be pointed out that in the *Coe* case cited above, while the court held that the petitioner had no legal capacity to sue, as a citizen and taxpayer, to invalidate a municipal consolidation; nevertheless in subsequent proceedings in quo warranto the same consolidation was declared invalid by the Supreme Court. (*People v. City of Los Angeles*, 187 Cal. 56.)

In support of her contention, petitioner relies upon the case of *Brown v. City Council of Long Beach*, 258 Pac. 693. This was a decision in the district court of appeal of the second district of California. After the decision by the district court of appeal, a petition for hearing in the Supreme Court was granted. The record does not disclose what disposition was ever made of the case, but no reported decision was ever rendered by the Supreme Court. Once a hearing has been granted by the Supreme Court, the decision and opinion of the district court of appeal is a nullity and

of no effect as a precedent or authoritative statement of law. (*Knouse v. Nimocks*, 8 Cal. 2d 482; *Ponce v. Marr*, 47 Cal. 2d 159.) The *Brown* case, relied upon by petitioner, is no authority for any purpose.

While we are inclined to feel that all of the annexation proceedings were in compliance with the law, in view of the foregoing decision it will not be necessary to consider any of the other points raised on this appeal.

The motion for temporary restraining order is denied.

The judgment is affirmed.

SHEA, *J. Pro Tem.*

WE CONCUR:

SHEPARD, *Acting P. J.*

COUGLIN, *J.*

APPENDIX "B"

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF SAN DIEGO

CHARLOTTE HAZELTON, et al.,

Plaintiffs,

vs.

THE CITY OF SAN DIEGO, a municipal corporation, et al.,

Defendants.

No. 230619

ORDER SUSTAINING DEMURRER WITHOUT LEAVE TO AMEND

The above entitled matter came on for hearing before the above entitled court on March 12, 1959 . . . on Demurrer of respondent The City of Coronado to the amendment to Petition for Writ of Certiorari . . . and on the Demurrer thereto of respondent The City of San Diego . . . the court having heard oral argument and considered the premises and notice being waived in open court;

IT IS ORDERED, ADJUDGED AND DECREED that the Demurrer of respondents and each of them be, and the same are hereby sustained without leave to petitioners to amend.

Dated: Mar. 16, 1959.

BONSON NOON
Judge of the Superior Court

BONSALL NOON

APPENDIX "C"

ORDINANCE NO. 6222
(NEW SERIES)

AN ORDINANCE APPROVING THE ANNEXATION TO THE CITY OF SAN DIEGO OF CERTAIN PORTIONS OF THE TIDELANDS OF SAN DIEGO BAY, IN THE COUNTY OF SAN DIEGO, STATE OF CALIFORNIA, KNOWN AND DESIGNATED AS "SAN DIEGO HARBOR TIDELANDS."

WHEREAS, pursuant to the Annexation of Uninhabited Territory Act of 1939, as amended, the Council of The City of San Diego, being the legislative body of said City, at a regular meeting held on the 5th day of January, 1954, adopted Resolution No. 116008, by which said resolution said Council initiated proceedings for the annexaton to, incorporation and inclusion in The City of San Diego of certain uninhabited territory in the County of San Diego, State of California, consisting of all those portions of the tidelands of San Diego Bay south of said City which are at present without the boundaries of the Cities of Coronado, National City and Chula Vista, and which said lands were particularly described in said resolution; and

WHEREAS, the reason said legislative body desired such annexation are that the inclusion of said lands within The City of San Diego will enable said City to provide better governmental control of the operation of ships within San Diego Harbor, and provide uniform regulation for shipping within said San Diego Bay; and

WHEREAS, said resolution gave notice of the proposed annexation, and described the boundaries of the territory so proposed to be annexed, which said territory was designated as "San Diego Harbor Tidelands"; and said resolution provided for a hearing to be held on Tuesday, the 9th day of February, 1954, at the hour of ten o'clock A. M., in the Council Chamber in the City and County Administration Building, Civic Center, San Diego, California, at a regular meeting of the City Council of said City, at which time any person owning real property within such territory proposed to be annexed and having any objections to the proposed annexation might appear before said City Council and show cause why such territory should not be so annexed; and

WHEREAS, the City Clerk of said City caused a copy of said resolution to be published twice, but not oftener than once a week, in The San Diego Union, a newspaper of general circulation published in said City, to-wit, upon the 7th and 14th days of January, 1954, and also in The National City News, a newspaper of general circulation published outside of the City but in the County in which is located the territory proposed to be annexed, to-wit, upon the 8th and 15th days of January, 1954; and said City Clerk also caused written notice of such proposed annexation to be mailed to each person to whom land within the territory proposed to be annexed is assessed in the last equalized county assessment roll available on the date said proceedings were initiated at the address shown on said assessment roll, or as known to said Clerk, and to any person who has filed his name and address and the designation of the lands in which he has any interest, either legal or equitable, with

said Clerk, and to the Attorney General and Secretary of State of the State of California, and to the Board of Supervisors of the County of San Diego; and

WHEREAS, on the 9th day of February, 1954, at ten o'clock A. M., at a regular meeting of the City Council of said City said hearing was held, and it was found that no protests were filed against such proposed annexation; and

WHEREAS, this Council, upon the recommendation of the City Attorney, adopted Resolution No. 118700 on the 22nd day of June, 1954, wherein it was found by said Council that since the proceedings above described had been taken and had certain of said tidelands proposed to be annexed by said City have been represented as being located within the territorial boundaries of the City of Coronado, and that some of said lands so described in said proceedings have been annexed to the City of Chula Vista; and

WHEREAS, said resolution further found that the interests of The City of San Diego would be protected and better served by eliminating some of the tidelands described in the foregoing proceedings which were annexed to the City of Chula Vista and also that an application for Coronado's consent should be had for the portion of the lands which might lie within the boundaries of the City of Coronado, and further that it would be in the interests of the City to amend the description contained in said original proceedings and provide an opportunity for another hearing on the annexation of those tidelands described in said last resolution; and

WHEREAS, pursuant to said Resolution No. 118700

last described the City Clerk of said The City of San Diego caused a copy of said resolution to be published twice, but not oftener than once a week, in The San Diego Union, a newspaper of general circulation published in said City, to-wit, upon the 1st and 8th days of July, 1954, and also in the Coronado-Journal-Compass, a newspaper of general circulation published outside of the City but in the County in which is located the territory proposed to be annexed, to-wit, upon the 1st and 8th days of July, 1954; and said City Clerk also caused written notice of such proposed annexation to be mailed to each person to whom land within the territory proposed to be annexed is assessed in the last equalized county assessment roll available on the date said proceedings were initiated, at the address shown on said assessment roll, or as known to said Clerk, and to any person who has filed his name and address and the designation of the lands in which he has any interest, either legal or equitable, with said Clerk, and to the Attorney-General of the State of California, to the State Lands Commission of the Board of Public Works of said State of California, and to the Secretary of State of said State of California; and

WHEREAS, on the 3rd day of August, 1954, at ten o'clock A. M., at a regular meeting of the City Council of said city said hearing as noticed by said City Clerk was held, and it was found that no protests were filed against such proposed annexation; and

WHEREAS, on the 29th day of June, 1954, there was filed with the City Clerk of said City a certified copy of a resolution of the City Council of the City of Coronado, No. 2485, wherein said City Council

consented to the detachment from the City of Coronado of the above described tidelands lying within the boundaries of said City of Coronado and to the annexation of said lands to The City of San Diego; NOW, THEREFORE,

BE IT ORDAINED By the Council of The City of San Diego, as follows:

Section 1. The City Council of The City of San Diego hereby approves the annexation to The City of San Diego of the following described territory situated in the County of San Diego, State of California, designated as "San Diego Harbor Tidelands," to-wit:

All of the tidelands lying under the waters, including the waters, of San Diego Bay lying south of the southerly boundary of The City of San Diego and below the mean high tide line of said bay, including a portion of said tidelands lying within the corporate boundaries of the City of Coronado; the boundaries of which said territory so proposed to be annexed being more particularly described as follows:

Beginning at the point of intersection of the south boundary line of The City of San Diego with the United States Pierhead Line between Harbor Line Stations 308 and 310, as said Pierhead Line is now established for the Bay of San Diego, said point being the true point or place of beginning; thence southerly along the said United States Pierhead Line to an intersection with the northerly boundary line of the City of Chula Vista, as per Ordinance No. 488 of the City Council of the City of Chula Vista, dated February 10, 1954; thence westerly, at right

angles to the said United States Pierhead Line, along said northerly boundary line of the City of Chula Vista to an intersection with the easterly boundary line of the City of Coronado, as per Ordinance No. 832 of the City Council of the City of Coronado, dated February 20, 1951; thence southerly along said easterly boundary line of the City of Coronado to an intersection with the southerly boundary line of the City of Chula Vista, as per said Ordinance No. 488 of the City Council of the City of Chula Vista; thence easterly along said southerly boundary line of the City of Chula Vista to an intersection with the Mean High Tide Line of the Bay of San Diego, as per Miscellaneous Map No. 79, on file in the office of the County Recorder of San Diego County, California; thence southerly and westerly along said Mean High Tide Line to an intersection with the said easterly boundary line of the City of Coronado; thence northerly along said easterly boundary line of the City of Coronado to a point 600 feet southerly from the said southerly boundary line of the City of Chula Vista; thence westerly at right angles to said easterly boundary line of the City of Coronado to an intersection with a line parallel to and distant 600 feet westerly from the said easterly boundary line of the City of Coronado; thence northerly and westerly along said 600-foot parallel line to an intersection with the said south boundary line of The City of San Diego; thence easterly along said south boundary line of The City of San Diego to the point or place of beginning.

Section 2. That the City Clerk of said City be, and he is hereby authorized and directed to file a certified copy of this ordinance in the office of the

Secretary of State of the State of California, giving the date of its passage; and from and after the date of the filing of said document in the office of said Secretary of State the annexation of such territory so proposed to be annexed and described herein shall be deemed to be and shall be complete, and thenceforth such annexed territory shall be, to all intents and purposes, a part of The City of San Diego.

Section 3. That the City Clerk be, and he is hereby further authorized and directed to file in the office of the Recorder of the County of San Diego an affidavit stating that all requirements of the laws pertaining to the proceedings for annexation of the territory hereinabove in Section 1 described have been complied with, which said affidavit shall be accompanied by a certified copy of the boundary description as set forth in said proceedings and also by a map delineating such boundary, as required by Sections 34080 and 34081 of the Government Code of the State of California; and he is further directed to file on or before the first day of February, 1955, with the County Assessor whose assessment roll is used for the tax levy, and with the State Board of Equalization, a statement of the change of boundaries of The City of San Diego, setting forth the legal description of the boundaries of the City changed, together with a map or plat indicating the boundaries, as required by Sections 54900, 54901, 54902 and 54903 of said Government Code.

Section 4. That the City Clerk of said City be, and he is further hereby directed to cause this ordinance to be published once in the official newspaper of said City, to-wit, The San Diego Union.

Section 5. This ordinance shall take effect and be in force on the thirty-first day from and after its passage.

Passed and adopted by the Council of the City of San Diego, California, this 10th day of August, 1954, by the following vote, to-wit:

YEAS—Councilmen: Burgener, Wincote, Dail, Godfrey.

NAYS—Councilmen: None.

ABSENT—Councilmen: Schneider, Kerrigan, Mayor Butler.

JOHN D. BUTLER,
Mayor of The City
of San Diego, California.

(SEAL)

FRED W. SICK,
City Clerk of The City of
San Diego, California
By HELEN M. WILLIG, Deputy

I HEREBY CERTIFY that the foregoing ordinance was not finally passed until six calendar days had elapsed between the day of its introduction and the day of its final passage, to-wit, on the 3rd day of August, 1954, and on the 10th day of August, 1954.

I FURTHER CERTIFY that the reading of said ordinance in full prior to its final passage was dispensed with by a vote of not less than four members of the Council, and that there was available for the

consideration of each member of the Council prior to the day of its final passage a written or printed copy of said ordinance.

FRED W. SICK,
City Clerk of the City
of San Diego, California.

(Seal)

By HELEN M. WILLIG,
Deputy

8/19

APPENDIX "D"

RESOLUTION No. 115920

WHEREAS, this Council is advised that a petition has been presented to the City Clerk for consideration by this body, signed by property owners residing in the South Bay area of this County, requesting the initiation of proceedings for the annexation to The City of San Diego of all the area of the Bay of San Diego at present situated outside of the territorial boundaries of the Cities of Chula Vista, National City and Coronado; and

WHEREAS, this Council is advised by the representatives of the State Legislature Interim Committee recently appointed for the purpose of recommending plans for the development of the Harbor of San Diego that it would be in the interest of such development and would facilitate the probabilities of the Legislature assisting in the development of said harbor by having the San Diego Bay tidelands annexed to The City of San Diego so that there would be no problem in the development of said bay involving territory outside of the corporate boundaries of the four cities now interested in the development of the harbor; and

WHEREAS, this Council is of the opinion that it would be in the interests of said City to follow said recommendation and institute proceedings for the annexation to The City of San Diego of all of the unincorporated territory situated within the Bay of San Diego; NOW, THEREFORE,

BE IT RESOLVED By the Council of The City of San Diego as follows:

That this Council approves in principle the annexation to the City of San Diego of all of the unincorporated area of the Bay of San Diego, and herein and hereby directs the City Manager and City Attorney to institute the necessary proceedings which will result in the incorporation of said unincorporated area of the bay as a part of The City of San Diego.

I hereby certify that the above and foregoing is a full, true and correct copy of Resolution No. 115920 of the City of San Diego, California, passed and adopted by the Council of said City Dec. 23, 1953.

PHILLIP ACKER, City Clerk
By Sara M. Harrison, Deputy

APPENDIX "E"

OFFICE OF THE ATTORNEY GENERAL
State of California

EDMUND G. BROWN
Attorney General

OPINION
of
EDMUND G. BROWN
Attorney General

Eugene B. Jacobs
Deputy Attorney General

No. 57 154
FEBRUARY 3, 1958

WILLIAM F. HOUSE, CHARLOTTE HAZELTON, and the CITY OF IMPERIAL BEACH, through their attorney, John F. O'Laughlin, and the CITY OF CHULA VISTA, through its attorney, Meredith Campbell, requested this office to grant leave to sue the City of San Diego, the Mayor of the City of San Diego, and City Councilmen of the City of San Diego, in quo warranto, to determine the right of the City of San Diego, pursuant to three annexations, to exercise jurisdiction and control over three territories designated as the San Diego Harbor Tidelands Annexation, the Western Salt Company Tract, and the South Bay Annexation.

Our conclusions may be sumarized as follows:

Leave to sue is denied since it appears the three

annexation proceedings were legally proper and, moreover, the application for leave to sue was not filed until almost three years after the completion of the annexation of the San Diego Harbor Tidelands Annexation and over two years after completion of the Western Salt Company Tract.

ANALYSIS

Summary of the Material Facts

The issues here presented involve at least ten city annexations and one incorporation of a city. A complete statement of facts is necessary for an understanding of the problems here involved.

San Diego Harbor Tidelands Annexation

On December 15, 1953, thirteen property owners and residents in unincorporated territory south of the cities of San Diego, National City, and Chula Vista, and also south of San Diego Bay, petitioned the City Council of the City of San Diego to take the necessary steps to annex the unincorporated portions of San Diego Bay not included within the Cities of Coronado, National City and Chula Vista. The petition stated that the reason for the request was to provide a means of annexation to the City of San Diego of the territory south of the City of Chula Vista and north of the border of Mexico. The petition stated that the territory needed water and sanitation facilities for the health and welfare of the people, and that an annexation of the unincorporated portion of the bay would speed development of the harbor. These petitioners stated that they would seek annexation of

their area to the City of San Diego if the link down San Diego Bay could be established.

On December 22, 1953, the City of San Diego, pursuant to *Government Code* section 35310 of the Annexation of Uninhabited Territories Act of 1939 (Govt. Code §§ 35000-35011, 35300-35326), on its own motion initiated an annexation designated as San Diego Harbor Tidelands Annexation.* Subsequently, on September 15, 1954, that annexation was completed by the filing of the annnexation ordinance by the Secretary of State (*Govt. Code* § 35318). The majority of the territory in this annexation consisted of a strip over the waters of San Diego Bay of approximately five miles, with one end of the strip contiguous to the then existing boundaries of the City of San Diego for the distance of almost one mile and the other end of the strip fanning out and including some tidelands bordering on the shores of the San Diego Bay, south of the City of San Diego. The water strip passed between the City of Coronado and the Cities of National City and Chula Vista. The first two and one-third miles of the strip was, on the average, one-third of a mile wide. The remaining portion of two and two-third miles strip was 600 feet wide. The fan at the southern end of the strip was approximately a triangle with two sides about one mile in length and the remaining side about one and two-thirds miles. All of the territory in this annexation was and is owned by the State Lands Commission of the State of California and that Commission was given proper notice of the application. No protest to

* Since the petition was not filed by landowners in the territory to be first annexed, the City of San Diego could not proceed on the annexation based on the petition.

this annexation was filed by the State Lands Commission. No persons resided, inhabited, or lived in this territory.

Except for the action discussed under the heading "Chula Vista Industrial Lands Tract No. 2", no legal action was taken seeking to attack the validity of the San Diego Harbor Tidelands Annexation until August 5, 1957, when an application for leave to sue in quo warranto was filed with this office. It has been conceded by the applicants that the procedural aspects of this annexation were proper.

At approximately the same time as the initiation of the San Diego Harbor Tidelands Annexation by the City of San Diego, the Cities of Chula Vista and National City each commenced annexations of a portion of San Diego Bay, also pursuant to the Annexation of Uninhabited Territories Act of 1939 (*Govt. Code* §§ 35000-35011, 35300-35326). The territory in the annexations by Chula Vista and National City overlapped to some extent with the territory included in the San Diego Harbor Tidelands Annexation.

While these annexations were pending, and in order to resolve the problem of overlapping territory, several conferences were held among and between officials of the Cities of San Diego, National City, Chula Vista, and Coronado, as well as with United States Navy Department and Chamber of Commerce officials and members and employees of the San Diego County Boundary Commission. At a meeting held February 4, 1954 presided over by a member of the San Diego County Boundary Commission, the representatives of the four cities involved agreed that each of the Cities of San Diego, Chula Vista, and National

City, should proceed with its proposed annexation of San Diego Bay tidelands, but that before the second hearings or the adoption of ordinances relating to those annexations the representatives of all four cities would meet together and decide upon definite amended boundaries for their various annexations which would be fair and satisfactory to all four cities and which would provide the City of San Diego with a corridor to the area south of San Diego Bay.

Ultimately the City of Coronado consented to a portion of that city being included in the water corridor that the City of San Diego included in the San Diego Harbor Tidelands Annexation. The City of San Diego completed the San Diego Harbor Tidelands Annexation on September 14, 1954 and the City of Chula Vista completed its annexation of a portion of San Diego Bay at about the same time. Pursuant to a request by the City Council of the City of National City, the City of San Diego, through its City Council under *Government Code* section 35304 on January 25, 1955 consented to the detachment from the City of San Diego of over one-half of the territory which had been included previously in the San Diego Harbor Tidelands Annexation. Subsequent to this consent for detachment by the City of San Diego, the City of National City annexed the detached portion of the San Diego Harbor Tidelands Annexation. The detachment by the City of San Diego and the annexation by the City of National City left each city with a fan-shaped beachhead at the southern end of San Diego Bay connected to each city by strips of 300 feet in width. The City of San Diego strip then was about five miles long and 300 feet wide and the National

City strip was about two and two-thirds miles long and 300 feet wide.

San Diego Western Salt Company Tract Annexation

On December 8, 1954, the Western Salt Company filed a petition with the City of San Diego pursuant to the Annexation of Unincorporated Territories Act of 1939 seeking annexation to the City of San Diego of territory designated as the Western Salt Company Tract, which territory was and is owned entirely by the Western Salt Company. Subsequently, on April 25, 1955 this annexation was completed by the filing of the annexation ordinance by the Secretary of State (*Govt. Code* § 35318). The territory in this annexation depends for contiguity solely on the San Diego Harbor Tidelands Annexation and is contiguous to the so-called water corridor annexation for the entire length of the beachhead, extending from the boundary of the City of Chula Vista on the north to the present boundary of the City of Imperial Beach on the south. The territory in the Western Salt Company Tract was of relatively uniform shape and did not depend upon a strip for contiguity to the territory of the San Diego Harbor Tidelands Annexation. The sole owner of the Western Salt Company Tract did not file a protest to this annexation, but on the contrary was the petitioning landowner who initiated the annexation proceedings. No persons resided, inhabited, or lived in this territory.

Except for the action discussed under the heading "Chula Vista Industrial Lands Tract No. 2", no legal action was taken seeking to attack the validity of the annexation of the Western Salt Company Tract until August 5, 1957 when an application for leave to sue

in quo warranto was filed herein. It has been conceded by the applicants that the procedural aspects of this annexation were proper.

Incorporation of the City of Imperial Beach

Subsequent to the completion of the San Diego Harbor Tidelands Annexation and the annexation of the Western Salt Company Tract, the incorporation of the City of Imperial Beach was completed on July 18, 1956. The boundaries of this city extended from the southern boundary of the City of Coronado and the southwestern boundary of the Western Salt Company Tract to the border of Mexico, and from the Pacific Ocean inland about two miles.

Chula Vista Industrial Lands Tract No. 1

In January, 1957 the City of Chula Vista pursuant to Annexation Act of 1913 (*Govt. Code* §§ 35000-35011, 35100-35158) commenced an annexation of territory designated as Industrial Lands Tract No. 1. This territory was located east of the northern portion of the Western Salt Company Tract and south of the City of Chula Vista. Industrial Lands Tract No. 1 was contiguous to the City of Chula Vista for a distance of about one-third of a mile, was of uniform shape, and did not contain any strips of territory. At the protest hearing on this annexation sufficient landowners protested so that no further proceedings were, or properly could have been taken; therefore, this annexation was never completed.

Imperial Beach Annexation

During December, 1956, the City of Imperial Beach commenced proceedings pursuant to the Annexation Act of 1913 (*Govt. Code* §§ 35000-35011, 35100-35158)

seeking to annex certain territory. On January 15, 1957 the City Council of the City of Imperial Beach adopted a resolution acknowledging the receipt from the proponents of a notice of intention to circulate a petition relating to that annexation. The resolution also approved the circulation of such a petition. The fiftieth day after the adoption of the resolution was March 6, 1957. On April 2, 1957 the petition was filed with the City Council of the City of Imperial Beach and on the same day that City Council adopted a resolution of intention to call a special election to submit the question of annexation to the electors residing in the territory. However, on April 11, 1957 the city clerk of that city found the signatures insufficient. On April 18, 1957 a supplemental petition was filed and thereafter on April 18, 1957 the City Clerk of the City of Imperial Beach certified the signatures to be sufficient. On May 7, 1957 a protest hearing was held, and continued to July 2, 1957. Sufficient landowners protested so that no further proceedings were, or properly could have been taken; therefore, that annexation was never completed and a resolution thereafter was adopted acknowledging defeat of the annexation.

The territory involved in this proceeding consisted of territory of approximately eleven square miles, which would have more than doubled the area of Imperial Beach. This territory was located to the east of Imperial Beach, to the south and east of the Western Salt Company Tract, and south of the territory sought to be annexed by the City of Chula Vista (Industrial Lands Tract No. 1). If the Imperial Beach and Chula Vista annexations had been completed the

City of San Diego would have been unable to annex any farther based on the Western Salt Company Tract since that tract would have been cut off from the unincorporated area in the so-called South Bay area.

Chula Vista Industrial Lands Tract No. 2

Subsequent to March 6, 1957 the City of Chula Vista pursuant to the Annexation Act of 1913 (*Govt. Code* §§ 35000-35011, 35100-35158) commenced a proceeding for annexation of territory designated as the Industrial Lands Tract No. 2. The territory in that proceeding extended from the City of Chula Vista to the City of Imperial Beach bordering on and touching the southern and eastern boundaries of the Western Salt Company Tract for most of its length and thereby would have cut off the City of San Diego from further annexations into the South Bay area. In late spring and early summer of 1957 the City of Chula Vista instituted an action in the Superior Court in San Diego County to contest the validity of the South Bay Annexation of the City of San Diego. The court in that case issued judgment that the Chula Vista annexation designated as Industrial Lands Tract No. 2 was void for lack of contiguity, and permitted the South Bay Annexation of the City of San Diego to be completed. The court there also ruled that since the San Diego Harbor Tidelands Annexation and the Western Salt Company annexation had been completed, those annexations could only be challenged by a suit in quo warranto.

San Diego South Bay Annexation

On March 7, 1957 proceedings were commenced by the City of San Diego for annexation under the An-

nexation Act of 1913 (*Govt. Code* §§ 35000-35011, 35100-35158) of territory designated as the South Bay Annexation. Prior to March 20, 1957 a sufficient petition was filed with the City of San Diego. On March 20, 1957 the City Council of the City of San Diego enacted a resolution of intention to call an election to submit the question of annexation to the electors residing in the territory. Thereafter a protest hearing was held and it was found that a majority protest had not been made since not a single protest had been filed. Thereafter a special election on the question of the South Bay Annexation was held on July 16, 1957 and the electors voted in favor of the annexation, 821 yes votes to 585 no votes. The annexation was completed by the filing of the annexation ordinance by the Secretary of State on September 13, 1957.

The territory in the South Bay Annexation was south and east of the Western Salt Company Tract and contiguous thereto. The territory extended from the Western Salt Company Tract to the border of Mexico and consisted of about twenty square miles. It was of uniform shape and did not include any strips of territory. Except for possible conflicts with the Imperial Beach Annexation the applicant concedes that the procedural aspect of the South Bay Annexation was proper.

On December 12, 1957 by telephone an informal request was made to this Office by the City of Imperial Beach for provisional leave to sue the City of San Diego in quo warranto to test the validity of San Diego's South Bay Annexation. The request was made pursuant to section 10, of Title 11 of the *California*

Administrative Code in order to avoid the running of the statute of limitations. On December 12, 1957, the City of Imperial Beach without authorization filed a complaint in the name of the State of California. They have already been directed to dismiss that complaint. On December 13, 1957 this Office issued provisional leave to sue and signed a complaint in quo warranto which was placed on file on December 13, 1957 by the City of Imperial Beach. The sole basis for the complaint was whether in light of the pending Imperial Beach Annexation, the San Diego South Bay Annexation was properly commenced. The City of Imperial Beach was permitted to have the summons issued, but was precluded from further action until and unless this Office should grant leave to sue after consideration of the formal application of Imperial Beach. The City of Imperial Beach was requested to file its formal application within a few days of December 13, 1957. On January 28, 1958, a formal application for leave to sue the City of San Diego to test the validity of the South Bay Annexation was filed with this office by the City of Imperial Beach.

Relators

The relators in the application regarding the validity of the San Diego Harbor Tidelands Annexation and the annexation of the Western Salt Company Tract are the City of Imperial Beach, the City of Chula Vista, William F. House, and Charlotte Hazelton. The City of Imperial Beach was not in existence at the time of the completion of either of these annexations. William F. House and Charlotte Hazelton were residents of the territory later included in the South Bay Annexation, but were not residents of the

territory included in the San Diego Harbor Tidelands Annexation or the Western Salt Company Tract. The only relator in the formal application and on the complaint concerning the South Bay Annexation is the City of Imperial Beach.

Services Supplied to the Western Salt Company Tract by the City of San Diego

Since the completion of the annexation by the City of San Diego of the Western Salt Company Tract, the Planning Department of the City of San Diego has laid out a zone plan for the area and has zoned the property in the area; the Fire Department of the City of San Diego has made periodic fire inspections of the area and of the structures within the area; the Department of Building Inspection of the City of San Diego has issued permits for building construction in the area and has caused such construction to be inspected; the Police Department of the City of San Diego has answered numerous police calls within the area and has conducted investigations of crimes committed therein; the California Water and Telephone Company has supplied water to the area under contract with the City of San Diego and the City of San Diego is required to compensate that company for any water so supplied; the City of San Diego has paid an assessment on the area to the Metropolitan Water District of Southern California; the Engineering Department of the City of San Diego has conducted surveys of the area for the purpose of locating roads and other improvements within the area and for the purpose of planning the future installation and construction of public improvements therein.

ISSUES PRESENTED

The documents filed by the relators and the proposed defendants present a number of issues which should be discussed.

1. *Are the three annexations of the City of San Diego invalid because the first annexation provided no contiguity for the three annexations to the City of San Diego?*

It is contended by the applicants that the San Diego Harbor Tidelands Annexation is invalid because it is not contiguous to the City of San Diego. If the applicants are correct then it would follow that the Western Salt Company Tract Annexation and the South Bay annexation would also be invalid for lack of contiguity since the only connection or possible contiguity would be through the San Diego Harbor Tidelands Annexation.

Is the San Diego Harbor Tidelands Annexation contiguous to the City of San Diego? It is our conclusion that it is.

That annexation was completed pursuant to the Annexation of Uninhabited Territory Act of 1939, commonly referred to as the Uninhabited Annexation Act (*Govt. Code* §§ 35000-35011; 35300-35326). That act requires that the territory to be annexed shall be contiguous to the annexing city (*People v. Town of Corte Madera*, 115 Cal. App.2d 32, 41). Regarding contiguity the Uninhabited Annexation Acts states:

> "To qualify for annexation, new territory shall be contiguous to: (a) The city, or (b) Contiguous territory where the electors have voted for annexation to the city" (*Govt. Code* § 35104).

The annexation statutes do not define the term "contiguous", although some requirements, limits on, and exemptions from the requisite contiguity do exist (*Govt. Code* §§ 35002.5, 35003, 35105, 35105.5 35158, 35200, 35201.5, 35302, 35304.5, 35326, and 35450).

The most recent as well as informative case as to the meaning of the word "contiguous" is *Rafferty v. Covina*, 133 Cal. App.2d 745. Therein the court stated at pages 752-753:

> "Before the adoption of section 35002.5 any contiguity to the city of the area to be annexed was sufficient. By the amendment [adding *Government Code* section 35002.5] the Legislature has stated what is not contiguity. It has not stated what *is* contiguity, except by the statement of what is deemed not to be contiguity. Therefore, in order to determine what is contiguity the same test is applied as was applied prior to the adoption of that section, except it must be tested further to determine whether it falls within the prohibition. Contiguity exists where boundary lines are coterminous (*City of Burlingame v. County of San Mateo, supra*)."

In *City of Burlingame v. County of San Mateo*, 90 Cal. App.2d 705, the Court stated:

> "Contiguity does not depend on the extent of the property annexed . . ." (p. 709).
>
> "The only limitation imposed by the statute in our case is that the annexed property must be contiguous to Burlingame. The 'horseshoe strip', as respondent calls it, is contiguous to, i.e., has a common boundary with, Burlingame for an aggregate distance of 200 feet" (p. 710).

The very minimum requirement for contiguity is that the city and the territory being annexed should touch (see, *People v. Town of Corte Madera*, 97 Cal. App.2d 726, 732.) In California touching at a mere point probably is not sufficient (see *People v. City of Lemoore*, 37 Cal. App. 79, 85).

There is no doubt that the territory annexed in the San Diego Harbor Tidelands Annexation was contiguous to the City of San Diego. The two touched and had a common boundry. To phrase it differently, their boundary lines were coterminous for almost a mile at the northern-most portion of the strip.

It has been contended by applicants, however, that since the strip passes over water contiguity is precluded. There is nothing in any of the annexation acts which indicates water areas may not be annexed. Historically, and at this time, many cities in California have included water areas in their boundaries. Much of San Francisco Bay and many islands therein have been included in such cities as San Francisco, Oakland, Berkeley, and Richmond. Some cities have annexed or have included in their original incorporation boundaries portions of the ocean, including offshore islands.

The annexation statutes generally refer to "territory", not land (*Govt. Code* §§ 35104 and 35302; but see §§ 35002.5, 35121, and 35313). It would seem that territory refers to area generally not just to dry land. Any other interpretation would require that all lakes, rivers, and bays included within California cities since the creation of this State should be considered as unincorporated territory. Moreover, the Government Code sections concerning county crea-

tion and county boundary alteration also refer to "territory" (*Govt. Code* §§ 23304 and 23207 (d)). Thus if "territory" is not interpreted to include both water and land areas, the absurdity of all water area in California being neither incorporated or unincorporated would result.

It is significant to note that an examination of the maps accompanying the application and the reply of the City of San Diego reveal that most of San Diego Bay is now included in one city or another. Even one of the relators herein, the City of Chula Vista, includes within its boundaries a large portion of San Diego Bay.

Since water areas may be included within the territory annexed by a city, should a treatment be given to water strips which differs from the manner the courts have approached land strips? Apparently not.

The courts have made it clear for many years that questions of population, size, form, extent, nature, and character of the territory to be included within a city have been left to the State Legislature, the people in the territory being annexed or incorporated, and the municipality involved (*People v. City of Los Angeles*, 154 Cal. 220, 224, 226; *City of Burlingame v. County of San Mateo*, 90 Cal. App.2d 705, 709; *People v. Town of Loyalton*, 147 Cal. 774, 778; *People v. Town of Corte Madera*, 115 Cal. App2d 32, 45-47). Such questions are held by those cases to be political and not judicial.

The courts have repeatedly emphasized that if the existing laws are complied with and no substantial provision of law has been violated, and if there is no limitation in the statute, the courts will not apply re-

strictions in the absence of fraud (*People v. City of Los Angeles*, 154 Cal. 220, 224, 228; *Johnson v. City of San Pablo*, 132 Cal. App.2d 447, 457; *City of Burlingame v. County of San Mateo*, 90 Cal. App.2d 705, 709-711).

As stated by the court in *Rafferty v. City of Covina*, 133 Cal. App.2d 745 at page 753:

> "The court's function in the premises is to interpret the rules laid down by the Legislature, not to make new or additional rules."

The only limitations controlling the nature and size of strips of territory to be annexed here are in *Government Code* sections 35002.5 and 35326.

Section 35002.5 reads in part:

> "Territory shall not be deemed contiguous as the word 'contiguous' is used in this chapter if the only contiguity is based on a strip of land over 300 feet long and less than 200 feet wide, such width to be exclusive of highways."

It is apparent that this limitation was added to the code to control to some extent the narrow strip annexations which were discussed in such cases as *City of Burlingame v. County of San Mateo*, 90 Cal. App.2d 705; *City of Anaheim v. City of Fullerton*, 102 Cal. App.2d 395; *Rafferty v. City of Covina*, 133 Cal. App.2d 745.

Section 35326 reads:

> "Territory shall not be annexed to a city pursuant to this article if, as a result of such annexation unincorporated territory is completely surrounded by such city."

This section precludes protective "horseshoe strips"

such as the one which was used in *City of Burlingame v. County of San Mateo*, 90 Cal. App.2d 705.

The cases before and since the addition of sections 35002.5 and 35326 have never questioned the practices of the cities in gerrymandering except with regard to the existence of fraud (see, *City of Anaheim v. City of Fullerton*, 102 Cal. App.2d 395).

Narrow strips over land have been approved by the courts (*People v. City of Los Angeles*, 154 Cal. 220; *City of Burlingame v. County of San Mateo*, 90 Cal. App.2d 705; *People v. Town of Corte Madera*, 115 Cal. App.2d 32; *Rafferty v. City of Covina*, 133 Cal. App.2d 745). The water strip is over 300 feet long, but it also is more than 200 feet wide; therefore, section 35002.5 appears to place no limit on the water strip annexation. The City of San Diego did not completely encircle unincorporated area with the water strip annexation; thus section 35326 is not applicable.

Applicants suggest that a water strip is improper because the city has no access to the land area annexed without crossing into another city or into unincorporated area. There appears to be no requirement in the code that access should be available even as to land annexations. In fact, the Legislature in some instances permits annexations without contiguity and thus without access (*Govt. Code* §§ 35002.5 (second paragraph); 35201.5). It is clear that there is no inherent, constitutional, or statutory requirement that in all instances there shall be contiguity or access, although there is an apparent desire by the Legislature for access in street strip annexations (*Govt. Code* §§ 35105.5 and 35304.5; see also, *City of Burlingame*

v. County of San Mateo, 90 Cal. App2d 705, 709).

The courts approved an extreme annexation in the *Burlingame* case, where there was no municipal purpose to be served other than cutting off another city. The water strip annexation here involved had as its ultimate purpose the providing of municipal services for residential, commercial, and industrial areas where the property-owners and the voters were amenable to and desired such annexation. Thus, it is a more justifiable action by a city than was the Burlingame annexation.

It is our conclusion that the San Diego Harbor Tidelands Annexation would, on all the facts involved, probably be held valid. Thus, it also follows that insofar as contiguity is concerned the Western Salt Company Tract Annexation and the South Bay Annexation are also valid. No other issues concerning the validity of the Western Salt Company Tract Annexation have been presented to us, therefore there is no question as to its validity.

In addition to the issues of law discussed above there is the passage of time and other matters of public interest which justify the denial of leave to sue. These are discussed below.

2. *In light of the passage of three years and two years, respectively, before application was made for leave to sue in quo warranto, would it be in the public interest to permit litigation concerning the validity of the first and second annexations of the City of San Diego?*

Even if there had been some flaw in the San Diego Harbor Tidelands Annexation or the Western Salt Company Tract Annexation we would deny leave to

sue because of the passage of three years as to the first and two years as to the second annexation after their completion before application was made to this office. We conclude that the delay was unduly long.

Moreover, *Code of Civil Procedure* section 349½ provides:

> "The validity of any proceedings for the annexation of territory to a municipal corporation . . . shall not be contested in any action unless such action shall have been brought within three months after the completion of such proceedings . . ."

This section has been held to apply to the State and its quo warranto actions (*People v. City of Los Angeles*, 93 Cal App. 532, 538; see also, *People v. Town of Corte Madera*, 115 Cal. App.2d 32).

In regard to the application of this code section, the Court in *People v. Town of Corte Madera*, *supra*, at page 40 stated:

> ". . . A curative statute may operate to cure any procedural irregularity—*even one going to jurisdiction*—but it cannot operate to breathe life into a proceeding, the very filing of which is prohibited by statute . . ." (emphasis added)

From that case it appears that *Code of Civil Procedure* section 349½ would probably cure any possible defect in contiguity in regard to the San Diego Harbor Tidelands Annexation. Particularly is this true after the passage of three years. The *Corte Madera* case, *supra*, and one of the problems involved in 27 *Ops. Cal. Atty. Gen.* 244, 247-248, presented unique circumstances where application of *Code of Civil Procedure* section 349½ would have frustrated

the annexation statutes. If the present case had involved an annexation where the territory annexed was located many miles from the annexing city with absolutely no connecting link, there is doubt whether *Code of Civil Procedure* section 349½ would be held to cure the lack of contiguity (see, 27 *Ops. Cal. Atty. Gen.* 244). But we do not have those circumstances here.

Moreover, as indicated in the statement of facts, the City of San Diego has provided many municipal services in the meantime, and it would not be in the public interest to upset their exercise of jurisdiction at this late date.

Also since the completion of the first two San Diego annexations the Legislature has in each session enacted validating acts which might be applicable to the present annexations. While the nature of the defects cured by such acts is not clear (28 *Ops. Cal. Atty. Gen.* 369, 372-373), we mention these acts for whatever application they may have.

3. *Since the property owners and the electors have approved the annexations by the City of San Diego and on the other hand have precluded annexation by the Cities of Chula Vista and Imperial Beach, is it in the public interest to grant leave to sue the City of San Diego in quo warranto to test the validity of their annexations?*

An examination of the many competing annexations involved herein requires a conclusion that the solid majority of the landowners and the electors in the territories annexed by the City of San Diego did not wish to become part of either Imperial Beach or Chula Vista, but did wish to join San Diego. In fact

not a single protest was filed against any one of the three San Diego annexations, and a solid majority of the electors voted in favor of the South Bay Annexation. On the other hand, every annexation attempted by Imperial Beach and Chula Vista has been stopped by protests of the property owners.

The cases make it clear that the efficacy of annexations is a decision for the city annexing and the inhabitants and property owners of the territory to be annexed (*People v. City of Los Angeles*, 154 Cal. 220, 224-226, 227). It would not be in the public interest to grant leave to sue and thereby prolong a competition between cities which is obviously not favored by those in the territory involved. The desire for expansion by bordering cities and the fact that such expansion may be precluded is not sufficient reason to invalidate an annexation (see, *People v. City of Los Angeles*, 154 Cal. 220, 227; *City of Burlingame v. County of San Mateo*, 90 Cal. App.2d 705, 709-711).

4. *Did the City of Imperial Beach through its annexation acquire sufficient jurisdiction of the territory to preclude the commencement and completion of the South Bay Annexation by the City of San Diego, and therefore, render the South Bay Annexation invalid?*

By telephone we were informed by the attorney for City of Imperial Beach that the City of San Diego had improperly commenced the South Bay Annexation within 50 days of the key date concerning the commencement of the Imperial Beach Annexation.

It is clear the City of San Diego commenced the South Bay Annexation after the 50 day period pro-

vided by *Government Code* section 35113 and thus was not in conflict with the City of Imperial Beach (*Govt. Code* § 35113). The facts before us also indicate that the sufficient petition received by San Diego after the expiration of the Imperial Beach 50 day period and before receipt of a sufficient petition by the City of Imperial Beach gave jurisdiction to the City of San Diego and precluded any further action by the City of Imperial Beach (*Govt. Code* § 35115). Moreover, the Imperial Beach Annexation failed because of the protests of the property owners.

In light of the record before this office, granting leave to sue to test the validity of the South Bay Annexation would not be in the public interest.

CONCLUSION

Leave to sue is denied as to all three of the San Diego Annexations. Provisional leave to sue heretofore granted pursuant to the provisions of section 10, Title 11 of the *California Administrative Code* concerning the South Bay Annexation is hereby withdrawn. Applicant, City of Imperial Beach, is directed to dismiss the complaint filed December 13, 1957 in San Diego County.

APPENDIX "F"

STATUTES OF CALIFORNIA — 32ND SESSION — 1897, CHAP. LXXXI, AN ACT RELINQUISHING TO THE UNITED STATES OF AMERICA THE TITLE OF THIS STATE TO CERTAIN LANDS. (APPROVED MARCH 9, 1897)

The People of the State of California, represented in Senate and Assembly, do enact as follows:

Sec. 1. All the right and title of the State of California in and to the parcels of land extending from high-water mark out to three hundred yards beyond low-water mark, lying adjacent and contiguous to such lands of the United States in this State as lie upon tidal waters and are held, occupied, or reserved for military purposes or defense, lying adjacent and contiguous to any island, the title to which is in the United States, or which island is reserved by the United States for any military or naval purposes or for defense, are hereby granted, released, and ceded to the United States of America; the boundaries of each parcel of land hereby granted, released, and ceded to the United States of America; the boundaries of each parcel of land hereby granted, released, and ceded to the United States to be a line along high-water mark, a line three hundred yards out beyond low-water mark; PROVIDED, that the title to each parcel of land hereby granted, released and ceded to the United States shall be, and remain, in the United States only so long as the United States shall continue to hold and own the adjacent lands now belonging to the United States: AND PROVIDED FURTHER, that this state reserved the right to serve and execute

on said lands all civil process, not incompatible with this cession, and such criminal process as may lawfully issue under the authority of this State against any person or persons charged with crimes committed without said lands.

Sec. 2. This Act shall take effect immediately.

STATUTES OF CALIFORNIA — 32ND SESSION — 1897, CHAPT. LVI, AN ACT CEDING TO THE UNITED STATES OF AMERICA JURISDICTION OVER ALL LANDS WITHIN THIS STATE WHICH HAVE BEEN OR MAY HEREAFTER BE ACQUIRED BY THE UNITED STATES FOR MILITARY PURPOSES. (APPROVED MARCH 2, 1897)

The People of the State of California, represented in Senate and Assembly, do enact as follows;

Sec. 1. The State of California hereby cedes to the United States of America exclusive jurisdiction over all lands within this State now held, occupied, or reserved by the Government of the United States for military purposes or defense, or which may hereafter be ceded or conveyed to said United States for such purposes; PROVIDED, that a sufficient description by metes and bounds and a map or plat of such lands be filed in the proper office of record in the county in which the same are situated; AND PROVIDED FURTHER, that this State reserves the right to serve and execute on said lands all civil process, not incompatible with this cession, and such criminal process as may lawfully issue under the authority of this State against any person or persons charged with crimes committed without said lands.

Sec. 2. This Act shall take effect immediately.

No. 724

Supreme Court of the United States

BRIEF OF RESPONDENTS
IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

NO. 724

LEE ROY HAZELTON, Administrator of the Estate of Charlotte Hazelton, Deceased,

Appellant and Petitioner,

vs.

THE CITY OF SAN DIEGO, a Municipal corporation, Councilmen of the City of San Diego, and the CITY OF CORONADO, a Municipal corporation, Councilmen of the City of Coronado,

Appellees and Respondents.

To the Honorable Earl Warren, Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respondents and appellees pray that the Petition for Writ of Certiorari to review the decision of the District Court of Appeal of the State of California, Fourth Appellate District, entitled, "LEE ROY HAZELTON, Administrator of the Estate of Charlotte Hazelton, Deceased, Appellant and Petitioner, vs. THE CITY OF SAN DIEGO, a Municipal corporation, Councilmen of the City of San Diego, and the CITY OF CORONADO, a Municipal corporation, Councilmen of the City of Coronado, Appellees and Respondents," be denied.

I
INTRODUCTION

A.
OPINIONS OF THE COURT BELOW

The opinion of the District Court of Appeal of the State of California, Fourth Appellate District, has been set forth in the Petition for the Writ of Certiorari, Appendix "A" page 1a.

B.
STATEMENT OF THE CASE

In order to clarify the facts before the Court and in order to set such facts forth in chronological order, appellees and respondents take this opportunity to present the following:

Pursuant to a written request of thirteen property owners and residents in the South Bay area, the City Council of the City of San Diego, on December 22, 1953, initiated an annexation designated as "San Diego Harbor Tidelands Annexation." This was an annexation under the provisions of the laws of the State of California relating to municipal annexation. No contention has ever been raised in the litigation involving the three annexations by The City of San Diego that the provisions of the California Statutes relating to such annexations were not followed. The area involved in this annexation was waters within the San Diego Bay under no political jurisdiction, but owned by the State of California and administered by the State Lands Commission of the State of California. The State Lands Commission was given proper notice of the pendency of the annexation and

Appellant's Petition, Appendix page 23e). This annexation was completed on September 14, 1954, at which time the ordinance of annexation was filed with the Secretary of State of the State of California. This annexation was contiguous at its northerly end with the then existing southerly boundaries of The City of San Diego across the Bay of San Diego (see Appellant's Petition, Appendix page 22e).

On December 8, 1954, pursuant to a petition from the Western Salt Company, the owner of all of the land involved within the area proposed to be annexed, the City Council commenced an annexation of the area known as "San Diego Western Salt Company Tract" under the provisions of the Uninhabited Annexation Act of the State of California. On April 25, 1955, this annexation was completed by the filing of the annexation ordinance with the Secretary of State of the State of California. The area annexed in this proceeding was contiguous to the San Diego Harbor Tidelands Annexation (see Appellant's Petition, Appendix page 26e).

On or about March 20, 1957, pursuant to a sufficient petition filed with the City Council of The City of San Diego, the City Council commenced the proceedings to annex the area known as "San Diego South Bay Annexation" under the provisions of the inhabited annexation laws of the State of California. No question has ever been raised in any of the lengthy proceedings involving this annexation that the requirements of the inhabited annexation laws of California were not strictly followed. A special election was held on July 16, 1957, and at such election 820 yes votes to 585 no votes were cast in favor of such annexation. Thereafter, the annexation was completed by the filing of the appropriate

ordinance with the Secretary of State on September 13, 1957. The San Diego South Bay Annexation area is contiguous at its north end with the San Diego Western Salt Company Tract Annexation (see Appellant's Petition, Appendix pages 29e et seq.).

Petitioner-appellant was and is a resident within the "South Bay Annexation" area, but was not and is not a resident of either of the areas involved in the two "uninhabited annexations" (see Appellant's Petition, Appendix pages 31e, 32e).

C.
STATUTES INVOLVED

1. California Government Code Section 35303:

"§ 35303. 'Uninhabited territory' defined.

For purposes of this article territory shall be deemed uninhabited if less than twelve registered voters reside within it at the time of the filing of the petition for annexation or the institution of proceedings on motion of the city legislative body."

2. California Government Code Section 35310:

"§ 35310. Initiation of annexation by legislative body; contents of resolution

The legislative body of a city may initiate proceedings to annex the territory on its own motion without requiring a petition. If it does, the resolution giving notice shall declare that proceedings have been initiated by the legislative body and set forth its reasons for desiring annexation."

3. California Government Code Section 35311:

"§ 35311. Publication or posting of resolution of annexation; service of notice on owners of lands; notice to supervisors of annexation of county lands

The city clerk of the annexing city shall cause a copy of the resolution to be published at least twice, but not oftener than once a week, in a newspaper of general circulation published in the city, and also in a newspaper of general circulation published outside of the city but in the county in which is located the territory proposed to be annexed; publication to be complete at least 20 days prior to the date set for the hearing. If there is no newspaper of general circulation published within the annexing city, he shall post a copy of the resolution not less than 20 days before the hearing in at least three conspicuous places within the territory. If proceedings are initiated by petition of the owner or owners of all of the territory to be annexed publication of the resolution outside of the city is not required.

(a) The city clerk of the annexing city shall also cause written notice of such proposed annexation to be mailed to each person to whom land within the territory proposed to be annexed, is assessed in the last equalized county assessment roll available on the date the proceedings were initiated, at the address shown on said assessment roll or as known to said clerk, and to any person who has filed his name and address and the designation of the lands in which he has any interest, either legal or equitable, with said clerk. (Emphasis added.)

(b) In the event any land within the territory proposed to be annexed to a city is owned by a county, the city clerk of the annexing city shall also cause written notice of such proposed

annexation to be mailed to the board of supervisors of such county.

The notice referred to in subsections (a) and (b) shall be given not less than 20 days before the first public hearing on the proposed annexation; provided, that such notice need not be sent if the owner or owners of all of the territory to be annexed have petitioned for annexation or filed their consent to such annexation in writing with the legislative body."

4. California Government Code Section 35312:

"§ 35312. Protests by owner against annexation; contents; 'owner' defined

At any time before the hour set for hearing objections, any owner of property within the territory may file written protest against the annexation. The protest shall state the name of the owner of the property affected and the description and area of the property in general terms. As used in this article, 'owner' means the owner as shown on the last equalized assessment roll, or the person or persons entitled to be shown as owner on the last equalized assessment roll, or where the property affected is subject to a recorded written agreement to buy, the purchaser under such agreement to buy shall be deemed the owner. Protests may be made on behalf of the owner by an agent." (Emphasis added.)

5. California Government Code Section 35313:

"§ 35313. Hearing on protests; limitation on further proceedings; valuation of public property; 'value of territory' defined

At the time set for hearing protests, or to which the hearing may have been continued, the legislative body shall hear and pass upon all protests so made. If protest is made by the

owners of one-half of the value of the territory as shown by the last equalized assessment roll, further proceedings shall not be taken. The value to be given publicly owned property for protest purposes shall be determined by the legislative body. If publicly owned property and privately owned property are proposed to be annexed in the same proceeding, further proceedings shall not be taken if protest is made either by private owners of one-half of the value of the privately owned territory proposed to be annexed, or by public owners of one-half of the publicly owned territory proposed to be annexed. As used in this article, 'value of the territory' means the value of the land and improvements thereon."

6. California Government Code Section 35313.1:

"35313.1 Tide or submerged lands; valuation; application of section

When territory proposed to be annexed consists wholly or partly of tide or submerged lands owned by the State, the legislative body shall determine the value of such tide or submerged lands for the purposes of this article. For the purposes of such determination, the State Lands Commission shall fix the value of tide or submerged lands owned by the State and shall notify in writing the legislative body of its determination. The legislative body may be guided by the valuation as determined by the State Lands Commission, or it may refuse to do so. If the legislative body refuses to accept such valuation, it shall bring an action for declaratory relief, to which the State Lands Commission shall be a party, for a determination of the value of the lands. During the pendency of such action further proceedings for annexation shall be stayed, and the valuation determined by the court shall be conclusive upon the legislative body. (Emphasis added.)

The provisions of this section shall not apply to any proceedings for the annexation of territory commenced prior to June 1, 1957."

7. California Government Code Section 35314:

"§ 35314. Effect of no protest

If such a protest is not made, the legislative body shall forthwith approve or disapprove the annexation, by ordinance."

II

THE QUESTIONS RAISED IN THE PETITION FOR THE WRIT OF CERTIORARI

On page 2 of the Petition is set forth the "Questions Presented." Because the question as worded therein contains conclusions of fact and law, respondents and appellees take this opportunity to restate the "questions" raised by the Petition for Writ of Certiorari. Considering the Petition for Writ of Certiorari from its "four corners" the following questions appear to be the real questions raised by the Petition: FIRST, that appellant was deprived of property without due process because of the failure of the uninhabited annexation law of California to provide for notice to him of the proposed uninhabited annexations, i.e., San Diego Harbor Tidelands Annexation and San Diego Western Salt Company Tract; and, SECOND, that uncertainty has been created as to the validity of the exercise of political jurisdiction and authority by The City of San Diego over the areas so annexed creating possibility of multiplicity of litigation in the future. As a corollary to the two basic positions advanced above by petitioner and appellant, appellant further takes the position that under California annexation law (whether inhabited or uninhabited) California municipal corporations

may not annex across bodies of water.

III
REASONS FOR DENYING THE WRIT

A.
APPELLANT AND PETITIONER, AS A PROPERTY OWNER IN THE SAN DIEGO SOUTH BAY ANNEXATION AREA, WAS NOT DEPRIVED OF PROPERTY WITHOUT DUE PROCESS OF LAW BY ANY OF THE THREE ANNEXATIONS INVOLVED IN THIS PROCEEDING

First and foremost, it should be noted that petitioner-appellant makes the "bare" statement that he has been deprived of property without due process under the proceedings as they have occurred in this matter. No showing has been made in the Petition for Writ of Certiorari in what respect petitioner's property has been taken without due process, nor under what real action of The City of San Diego such property, if it has been taken, was so taken. The question of the bare allegation of taking of property without due process has been raised before this Court on many other occasions. It was so raised in Consolidated Turnpike Company v. Norfolk & Ocean View Railway Company (1912) 228 U.S. 596, 57 L. Ed. 982. At page 983 of the Lawyers' Edition, the court stated:

> "The bare claim that the judgment operated to take property of the plaintiff in error without compensation is not enough to justify this court in taking jurisdiction unless it also appears from the averments of fact upon which the claim must depend that the question is one real and substantial, and not so utterly without merit as to be frivolous, or a question concluded by previous

decisions of this court. New Orleans Waterworks Co. v. Louisiana, 185 U.S. 336, 46 L. ed. 936, 22 Sup. Ct. Rep. 691; Equitable Life Assur Soc. v. Brown, 187 U.S. 308, 314, 47 L. ed. 190, 193, 23 Sup. Ct. Rep. 123; Deming v. Carlisle Packing Co. 226 U.S. 102, ante, 140, 33 Sup. Ct. Rep. 80. In Equitable Life Assur. Soc. v. Brown, supra, it was said: '"There must be a real, substantive question on which the case may be made to turn;" that is, "a real, and not a merely formal, Federal question, is essential to the jurisdiction of this court."' The writ in that case was dismissed, the court saying: 'That although a Federal question was raised below in a formal manner, that question, when examined with reference to the averments of fact upon which it was made to depend, is one which has been so explicitly decided by this court as to foreclose further argument on the subject, and hence to cause the Federal question relied upon to be devoid of any substantial foundation or merit.'

"The unsubstantial character of the Federal question in the present case will appear when we come to examine the facts upon which it depends."

Assuming that petitioner-appellant has been deprived of property, the question is still raised as to whether such deprivation has occurred without due process and whether, even though it has so occurred, petitioner-appellant is entitled to relief against The City of San Diego. Such question has likewise been considered many times by the United States Supreme Court. In Hunter v. Pittsburgh (1907) 207 U.S. 161, 52 L. Ed. 151, the United States Supreme Court considered this question. At page 159 of Lawyers' Edition, it was stated as follows:

". . . Although the inhabitants and property owners may, by such changes, suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right, by contract or otherwise, in the unaltered or continued existence of the corporation or its powers, and there is nothing in the Federal Constitution which protects them from these injurious consequences. The power is in the state, and those who legislate for the state are alone responsible for any unjust or oppressive exercise of it."

The foregoing has been substantially upheld throughout most of the states in the United States. In an annotation in 64 A.L.R. 1335 entitled, "Power to extend boundaries of municipal corporations" the subject is rather extensively covered. More particularly, at page 1358 the problem here involved is discussed at some length. At page 1358 it is stated:

"It has been held that an act extending the boundaries of a municipal corporation is not unconstitutional as depriving the people of the annexed territory of their property without due process of law through the means of illegal taxation. . . "

The questions rasied by petitioner-appellant in this case have been raised many times in California. Most recently in People v. City of Palm Springs (1958) 51 Cal. 2d 38, 331 P. 2d 4, the questions raised by petitioner-appellant were raised and considered by the Supreme Court of the State of California. Following is a list of some of the questions considered by the court and answered therein:

(a) Plaintiff alleges that the Southern Pacific

Company, an owner of land in the territory, was not served with written notice of its opportunity to protest the annexation, and contends that this omission deprived the city council of jurisdiction to annex the territory;

(b) Plaintiff claims that none of the landowners were afforded the kind of notice or right of hearing required by the act;

(c) Plaintiff contends that the annexation is void because it is unreasonable;

(d) Plaintiff claims that the annexation is void as a fraudulent abuse of the authority conferred by statute; and

(e) Plaintiff contends that the annexation will operate to take property without due process of law.

Each of the foregoing questions was specially answered by the court.

As to the question (a) above, the court held, at page 3 that failure to allege that the city failed to mail written notice to all landowners within the area proposed to be annexed was fatally deficient to the statement of a cause of action. Such statement, of course, carries with it the implication that no notice is required to be given to property owners outside the area proposed to be annexed under the provisions of Section 35311 of the California Government

Code which requires only that notice be mailed to the property owners within the area proposed to be annexed.

Considering question (b) above, the court held that the provisions of Section 35312 of the California Government Code are clear and that only written protests may be filed before the hour set for the hearing by "any owner of property within the territory." This holding further bolsters the position that property owners outside the area proposed to be annexed are not entitled to notice under due process requirements.

In answer to question (c) listed above, the court held at page 45 that the topography, size, shape, character or extent of the territory annexed is a political question and that the wisdom or expediency of any particular annexation is not a judicial question.

Question (d) was answered by the court at page 46 upon the basis that there was no violation or evasion of any statutory provision relating to the annexation and that bare allegations to the effect that there is a fraudulent abuse of authority do not establish such abuse.

In answer to question (e), that the annexation will operate to take property without due process of law, the court stated at page 47:

> ". . . There is no merit in this contention. No one has a vested right to be either included or excluded from a local governmental unit (Peart v. Board of Supervisors, 145 Cal. App. 2d 8, 11 (301 P. 2d 874)), and the fixing of territorial boundaries of a municipal corporation will not ordinarily constitute an invasion of

federal constitutional rights. (Hunter v. City of Pittsburgh, 207 U.S. 161, 178-179 (28 S. Ct. 40, 52 L. Ed. 151); Forsyth v. Hammond, 166 U.S. 506, 518 (17 S. Ct. 665, 41 L. Ed. 1095); Kelly v. City of Pittsburgh, 104 U.S. 78, 80-81 (26 L. Ed. 658).)"

One additional statement was made by the California Supreme Court in the Palm Springs case. At page 48 the court, in considering the question of the taxation of property included within an area annexed by an adjacent municipality, used the following language:

"Since the burden which plaintiff anticipates is that of a general ad valorem property tax imposed to support the local government, it is not necessary that any special benefit accrue to the land by reason of the annexation. (City of Santa Rosa v. Coulter, 58 Cal. 537; see also Town of Dixon v. Mayes, 72 Cal. 166, 168 (13 P. 471).) The validity of such a tax does not depend on the receipt of some special benefit as distinguished from the general benefit to the community. (Memphis & Charleston Ry. Co. v. Pace, 282 U.S. 241, 246, 249 (51 S. Ct. 108, 75 L. Ed. 315, 72 A.L.R. 1096); St. Louis & S.W. Ry. Co. v. Nattin, 277 U.S. 157, 159 (48 S. Ct. 438, 72 L. Ed. 830); Morton Salt Co. v. City of South Hutchison, supra, 177 F. 2d 889, 891-892.) '(I)t is constitutionally sufficient if the taxes are uniform and are for public purposes in which the whole city has an interest.' (Morton Salt Co. v. City of South Hutchison, supra, 177 F. 2d 889, 891.) Thus the performance of such ordinary municipal services as police and fire protection within the existing boundaries of the city (see Kelly v. City of Pittsburgh, supra, 104 U.S. 78, 82) together with the prospect that the city, consistent with its own interests and declared intent, will extend those services to the

annexed territory, will justify the imposition of taxes and will be sufficient to satisfy the due process clauses of the state. . . "

B.

THE FEDERAL COURTS, INCLUDING THE UNITED STATES SUPREME COURT, SHOULD BE BOUND BY DETERMINATION OF STATE OFFICIALS, STATE BODIES AND THE STATE COURTS INSOFAR AS INTERPRETATION OF STATE LAWS ARE CONCERNED

The decisions of the state courts should be followed by the Federal courts and by the United States Supreme Court. The fact that the intermediate appellate court of California (the Fourth District Court of Appeal) has been the last court to issue its decision should not induce the Federal courts or the United States Supreme Court to disregard the statements contained in that decision.

In West v. American Telephone & Telegraph Company (1940) 311 U.S. 223, 85 L. Ed. 139, the United States Supreme Court considered the effect of a decision by the intermediate appellate state court which the highest court of the state refused to review. At page 144 of Lawyer's Edition, the court stated:

> "Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise. Six Cos. of Cal. v. Joint Highway Dist. No. 267, decided

this day (311 US 180, ante, 114, 61 S Ct 186); Fidelity Union Trust Co. v. Field, No. 32, decided this day (311 US 169, ante, 109, 61 S Ct 176). Cf. Graham v. White-Phillips Co. 296 US 27, 80 L ed 20, 56 S Ct 21, 102 ALR 24; Wichita Royalty Co. v. City Nat. Bank. supra (306 US 107, 83 L ed 517, 59 S Ct 420); Russell v. Todd, 309 US 280, 84 L ed 754, 60 S Ct 527 supra. This is the more so where, as in this case, the highest court has refused to review the lower court's decision rendered in one phase of the very litigation which is now prosecuted by the same parties before the federal court. True, some other court of appeals of Ohio may in some other case arrive at a different conclusion and the Supreme Court of Ohio, notwithstanding its refusal to review the state decision against the petitioner may hold itself free to modify or reject the ruling thus announced. Brewster v. Hill, 128 Ohio St 343, 353, 190 NE 766. Even though it is arguable that the Supreme Court of Ohio will at some later time modify the rule of the West Case, whether that will ever happen remains a matter of conjecture. In the meantime the state law applicable to these parties and in this case has been authoritatively declared by the highest state court in which a decision could be had. . . "

More particularly, the real policy to be followed in order to prevent the "unsettlement of the law" has been stated by the United States Supreme Court in Forsyth v. Hammond, 166 U.S. 506, 41 L. Ed. 1095. The extensive question of review by the Federal courts, after determination by the state courts, was covered in that case but, more particularly, the question of the binding effect of the decision of the state courts was likewise reviewed. At page 1100 of Lawyers' Edition the court stated:

"The construction by the courts of a state of its Constitution and statutes is, as a general rule, binding on the Federal courts. We may think that the supreme court of a state has misconstrued its Constitution or its statutes, but we are not at liberty to therefore set aside its judgments. That court is the final arbiter as to such questions. . . "

C.

THE CORPORATE EXISTENCE, THE POWERS OF MUNICIPALITIES IN CALIFORNIA AND THE QUESTIONS OF ANNEXATION BY MUNICIPALITIES ARE MATTERS OF LOCAL CONCERN ONLY

The interpretation of annexation laws in California or in any other state for that matter, is one which should be left to the state courts, and the Federal courts should not interfere unless there is a very substantial showing of the necessity for such interference. The United States Supreme Court has considered the question of review of decisions by state officials and state courts on many occasions and has set forth rules on whether and when such review would be proper. In Hunter v. Pittsburgh (1907) 207 U.S. 161, 52 L. Ed. 151, the question of review of decisions of the state court had been considered. At page 159 of Lawyers' Edition, the court stated:

". . . Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them. For the purpose of executing these powers properly and efficiently they usually are given the power to acquire, hold, and manage personal and real property. The number, nature,

and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state. Neither their charters, nor any law conferring governmental powers, or vesting in them, property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the state within the meaning of the Federal Constitution. The state, therefore, at its pleasure, may modify or withdraw all such powers, may take, without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the state is supreme, and its legislative body, conforming its action to the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. Although the inhabitants and property owners may, by such changes, suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right, by contract or otherwise, in the unaltered or continued existence of the corporation or its powers, and there is nothing in the Federal Constitution which protects them from these injurious consequences. The power is in the state, and those who legislate for the state are alone responsible for any unjust or oppressive exercise of it."

In Mount Pleasant v. Beckwith (1879) 100 U.S. 514, 25 L. Ed. 699, the United States Supreme Court determined that in the absence of any constitutional restriction, the corporate existence and powers of counties, cities and towns are

subject only to the legislative control of the states.

More particularly, in 1896 the United States Supreme Court considered the question of attacks upon the validity of the organization or creation of municipal corporations under existing state law. In Shapleigh v. San Angelo (1896) 167 U.S. 646, 42 L. Ed. 310, the court stated at page 312:

> ". . . The state, being the creator of municipal corporations, is the proper party to impeach the validity of their creation. If the state acquiesces in the validity of a municipal corporation, its corporate existence cannot be collaterally attacked."

The California Courts have followed the doctrine stated in the Shapleigh case. In City of Burlingame v. County of San Mateo (1949) 90 Cal. App. 2d 705, 203 P. 2d 807, the court stated at page 711:

> "The wisdom or expediency of the annexation of this territory is not a concern of the courts. We can go no further than to see that the existing laws are complied with. The Supreme Court said in People v. City of Los Angeles, supra, 154 Cal. 220, 228:
>
> 'If it be unwise legislation to grant the power to voters in the respective localities as broadly as it is conferred under the Annexation Act, appeal must be made to the legislature itself. That body has the constitutional power to confer the authority on them to do so and has done it, and whether it was wise or not, the courts cannot inquire into it.'
>
> "Later California cases are cited by respondent but it is needless to discuss them since they decide other questions and do not overrule

People v. City of Los Angeles, supra, 154 Cal. 220. Much time is devoted by counsel to Brown v. City Council of City of Long Beach (Cal. App.) 258 P. 693. A hearing was granted in that case by the Supreme Court and if anything said in that opinion conflicts with People v. City of Los Angeles, supra, 154 Cal. 220, it cannot stand as an authority. Likewise cases from other jurisdictions cannot be considered which conflict in principle with the position taken by the Supreme Court of this state."

"The motives of the city council of Burlingame (5 Cal. Jur. 640) or of Mills Estate, Incorporated (1 Cal. Jur. 336) cannot be inquired into so long as they proceeded according to established law."

In In re Pfahler (1906) 150 Cal. 71, at page 79, the court stated:

". . . It is clearly a question of local policy with each state what shall be its various political subdivisions for purposes of internal government, and what shall be the extent and character of the powers of those subdivisions and the manner of their exercise. The power of a state in such matters is absolute. (See Claiborne v. Brooks, 111 U.S. 400, (4 Sup. Ct. 489); Forsyth v. Hammond, 166 U. S. 506, (17 Sup. Ct. 665).) . . ."

D.

THE EXERCISE OF "POLITICAL JURISDICTION" BY A MUNICIPAL CORPORATION ACROSS NAVIGABLE WATERS IS CONTEMPLATED BY THE LAWS OF THE STATE OF CALIFORNIA

Petitioner-appellant, throughout all of the many briefs and points and authorities which have been filed in the

litigation prior to this application for a Petition for Writ of of Certiorari, confuses the meaning of the word "land" in the contiguity requirements of the annexation laws of the State of California and the use of the word "territory" in the annexation laws of the State of California. Attention should be given to the existence of political jurisdiction extending across substantial areas of navigable waters by municipalities in the State of California.

In the case of the City of San Francisco, political jurisdiction of that municipality extends across a substantial portion of San Francisco Bay to include within that municipality Treasure Island and Yerba Buena Island.

In the case of the Cities of Los Angeles and Long Beach, political jurisdiction extends across navigable waters to include a portion of Terminal Island within each city. In addition, at the time of the establishment of The City of San Diego, the political jurisdiction thereof extended across San Diego Bay to include what is now the City of Coronado.

Presently, the jurisdiction of The City of San Diego extends across the San Diego Bay to include certain portions of North Island upon which is a naval installation. North Island is contiguous to and joined by land with the City of Coronado but is contiguous to The City of San Diego only by the navigable waters of the Bay of San Diego.

In decisions in both the state courts and the Federal courts the word "land" has been interpreted. In Higgins Oil & Fuel Co. v. Snow, 113 F 433, at 438, it was stated:

> "It is elementary that 'land' itself, in legal contemplation, extends from the sky to the

depths. Coke says, 'The term "land" includes, not only the ground or soil, but everything which is attached to the earth, whether by the course of nature, as trees, herbage, and water, or by the hand of man, as houses and other buildings; and it has an indefinite extent upwards as well as downwards, so as to include everything terrestrial under or over it.' Co. Litt. 4a. Blackstone says: 'Land comprehends all things of a permanent and substantial nature, being a word of very extensive signification; also, if a man grants all his "lands," he grants all his mines of metals, and his fossils, his woods, his waters, and his houses, as well as his fields and meadows.' 2Bl. Comm. 16-18. Washburn says: 'Land is always regarded as real property, and, ordinarily, whatever is erected or growing upon it, as well as whatever is contained within it or beneath its surface, such as minerals and the like, upon the principle that "cujus est solum, ejus est usque ad coelum" in one direction, and "usque ad orcum" in the other.' 1 Washb. Real Prop. 3. Land is the surface of the earth, whatever is attached to it by nature or by the hand of man, and all that is contained within or below it."

The question of whether political jurisdiction could extend across a substantial area of navigable waters was raised in the State of Michigan. In that state the Constitution required that representative districts (counties) be of convenient and contiguous territory. In Houghton County Supervisors v. Blackner, 52 N.W. 951; 92 Mich. 638; 16 L.R.A. 432, at 435, the Court stated:

"Some argument is made that the Legislature was bound under the provisions of section 3, art. 4, declaring that 'each representative district shall consist. .. .of convenient and con-

> tiguous territory,' to unite Keweenaw and Isle Royal counties to the county of Houghton, for the reason that, within the meaning of the Constitution, they were not convenient and contiguous territory to any other county. This clause in the Constitution does not bear the restricted meaning contended for. It does not mean in contact by land. Certainly, so far as the islands are concerned, they may be considered contiguous, although separated by wide reaches of navigable deep waters."

In West Berkeley Land Co. v. Berkeley, 164 Cal. 406, the Court discusses at some length the difference between political jurisdiction and ownership, and discusses the meaning of the words "land" and "lands." That was an action to recover from the City of Berkeley moneys paid under protest for the opening and extension of a street under the Street Opening Act of 1889. After discussing the application of the municipality's power over tidelands, the Court stated at page 408:

> "The legislature has left the act in practically its original form, and we must conclude, in view of both prior and subsequent judicial decisions, that the words "land" and "lands" in that statute were used in the technical sense meaning "territory" and not with the definition for which appellants contend."

In Pan American Products Company v. Texas City (1957) 303 S.W. 2d 780, a substantial portion of the annexed area involved completely submerged tidelands. The annexation was attacked by oil lessees of the state who claimed that the only purpose of the annexation was to obtain revenue. The Court upheld the annexation on the basis that it was

"adjacent" within the meaning of the annexation laws of the State of Texas.

In the Petition for Writ of Certiorari, petitioner-appellant cites as authority for the right to attack the validity of these annexations the case of Ocean Beach Heights, Inc. v. Brown Crummer Inv. Co., 302 U.S. 614, 82 L. Ed. 478. The Ocean Beach Heights case involved a writ of certiorari requesting the United States Supreme Court to review a decree of the United States Circuit Court affirming a decree of the United States District Court in favor of plaintiffs. Plaintiffs were requesting an injunction in a bondholders suit to restrain the owners of land from interfering with the collection of taxes. The land in question had been held in a quo warranto suit in the State Court to have been improperly included in incorporating a town. The Supreme Court held that certiorari would lie. The Ocean Beach Heights case is substantially different from the case presently before the Court. In our case, under the applicable State law and appeal to the Courts, the validity of the annexations was sustained.

More appropriate and more pertinent is the case of Forsyth v. City of Hammond, 166 U.S. 506, 41 L. Ed. 1095. This case involved a writ of certiorari to the Supreme Court. The Court of Appeals for the Seventh Circuit Court for the District of Indiana denied a motion for injunction. The United States District Court had refused to enjoin the collection of taxes by the city against petitioner's property. The petitioner had previously adjudicated the question of the annexation to the Supreme Court of the State of Indiana where the annexation was held to be valid. In this action the United States Supreme Court remanded the case to the Circuit Court with

instructions that the suit be dismissed. At page 1099 of Lawyer's Edition:

> "The decision of the Supreme Court of Indiana was in favor of the validity, that of the Court of Appeals against their validity, and if it is judicial to hear and determine one way, it is likewise judicial to hear and determine the other. If action by the state tribunals stopped with the decree of the trial court, it might be said that the plaintiff did not voluntarily seek that forum. She was brought in by appropriate process, and compelled to there litigate the question. But after an adverse decree she insisted that it was not only erroneous but void, and voluntarily commenced an action in the supreme court of the state to have that claim established. She invoked the jurisdiction of that court. She summoned the city of Hammond into that forum and there challenged the decree of the circuit court, challenged it for error and also for lack of jurisdiction. The questions both of error and of jurisdiction were certainly judicial in their nature and questions within the undoubted cognizance of the supre.. : court. She voluntarily sought its judgment? Can she, after its decision, be heard in any other tribunal to collaterally deny the validity thereof? Does not the principle of res judicata apply in all its force? Having litigated a question in one competent tribunal and been defeated, can she litigate the same question in another tribunal, acting independently, and having no appellate jurisdiction? The question is not whether the judgment of the supreme court would be conclusive as to the question involved in another action between other parties, but whether it is not binding between the same parties in that or any other forum. The principles controlling the doctrine of res judicata have been so often announced, and are so universally recognized, that citation of authorities is

scarcely necessary. Though the form and causes of action be different, a decision by a court of competent jurisdiction in respect to any essential fact or question in the one action is conclusive between the parties in all subsequent actions.

"All that we mean to decide is that the matter of the territorial boundaries of a municipal corporation is local in its nature, and, as a rule, to be finally and absolutely determined by the authorities of the state.

"The construction by the courts of a state of its Constitution and statutes is, as a general rule, binding on the Federal courts. We may think that the supreme court of a state has misconstrued its Constitution or its statutes, but we are not at liberty to therefore set aside its judgments. That court is the final arbiter as to such questions.

"In the first place the decision of the supreme court of the state was rendered before the filing of this bill in the circuit court of the United States, and not as in the Burgess Case after the judgment in the circuit court. In the second place the decision was upon a question of a local nature, involving the internal policy of the state, and therefore is such a decision as should be, generally speaking, recognized and followed by the Federal courts. And, thirdly, it was a final adjudication between the same parties, and should have been respected as binding and conclusive upon the principle of res judicata."

Considering both the Ocean Beach Heights case and the Forsyth case, it is readily apparent that the facts of the Forsyth case are more applicable to the present petition. In the Ocean Beach Heights case the annexation upon

attack in the quo warranto proceedings in the state court, was held to be invalid and improper. In the Forsyth case all of the appropriate administrative agencies and the courts of the State of Indiana had determined that the annexation was valid and proper. Under the provisions of the applicable California state law relating to petitioner's attack upon the validity of the three annexations here involved, the Attorney General of the State of California ruled that the annexations were valid. The present petitioner and appellant thereafter filed an original proceeding in the Supreme Court of the State of California entitled, "William F. House, Charlotte Haselton, and the City of Imperial Beach, a municipal corporation, Petitioners, vs. Edmund G. Brown, Attorney General for the State of California, et. al., Defendants." Under the provisions of the Supreme Court Rules, the petition was transferred to the California Fourth District Court of Appeal for hearing thereon. The District Court of Appeal (Case No. 4th Civil 5883) decided in favor of the validity of the annexation. The petition for hearing to the California Supreme Court was denied (see Appellant's Petition, page 4). Thereafter, appellant filed the present case in the San Diego Superior Court. Upon demurrer sustained without leave to amend and appeal therefrom, the California District Court of Appeal denied further relief to petitioner-appellant. The California Supreme Court thereafter denied a petition for hearing (see Appellant's Petition, page 5).

A review of the foregoing facts clearly indicates that the California administrative agency involved (the Attorney General) and all of the California Courts have held that the annexations here involved are valid. This is identical

with the facts in the Forsyth case wherein the state agencies and courts all ruled the annexations valid. Under such circumstances it is obvious that the Ocean Beach Heights case is not applicable to the present case. For the foregoing reasons, Forsyth v. Hammond, 166 U.S. 506, 41 L. Ed. 1095, is the precedent which governs.

E.

APPELLANT AND PETITIONER HAS MADE NO SHOWING OF COMPLIANCE WITH RULE 19 OF THE RULES OF THE UNITED STATES SUPREME COURT

A reading of Rule 19 of the Rules of the United States Supreme Court indicates that the Writ of Certiorari should be granted only in cases involving principles which require settlement because of extreme importance to the public in cases where there is a substantial and embarrassing conflict of opinion and authority between lower courts. Petitioner and appellant has made no attempt to follow the basic doctrines and policies established in Rule 19 and has failed to set forth, other than in a "bare legal assertion" facts or statements sufficient to bring him within the rule. Two cases of recent date which have been denied by the United States Supreme Court cover the principles set forth hereinabove.

The first is N.L.R.B. v. Pittsburgh Steamship Company (1950) 340 U.S. 498, 95 L. Ed. 479. At page 482 of Lawyers' Edition, the court stated:

> ". . . Certiorari is granted only 'in cases involving principles the settlement of which is

of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.' Layne & Bowler Corp. v. Western Well Works, 261 US 387, 393, 67 L ed 712, 714; 43 S Ct 422; Revised Rules of the Supreme Court of the United States, Rule 38(5). The same considerations that should lead us to leave undisturbed, by denying certiorari, decisions of Courts of Appeals involving solely a fair assessment of a record on the issue of unsubstantiality, ought to lead us to do no more than decide that there was such a fair assessment when the case is here, as this is, on other legal issues."

The second case is Rice V. Sioux City Cemetery (1954) 349 U. S. 70, 99 L. Ed. 897. At page 901 of Lawyers' Edition, the court stated:

". . . 'there are special and important reasons' for granting the writ of certiorari, as required by Supreme Court Rule 19.

"This Rule, formulated 30 years ago, embodies the criteria, developed ever since the Evarts Act of 1891, by which the Court determines whether a particular case merits consideration, with due regard to the proper functioning of the limited reviewing power to which this Court is confined, decisively restricted through the creation of the intermediate Courts of Appeals and more largely confined by the Judiciary Act of 1925. In illustrating the character of reasons which may be deemed 'special and important,' the Rule refers to cases.

"'Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably

not in accord with applicable decisions of this court.'

"A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. (Magnum Import Co. v. Coty, 262 US 159, 163, 67 L ed 922, 924, 43 S Ct 531; see also Address of Mr. Chief Justice Vinson, before the American Bar Association, Sept. 7, 1949, 69 Sup Ct v, vi; Address of Mr. Chief Justice Hughes, before the American Law Institute, May 10, 1934, XI Proc Am Law Inst 313.) 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion. Cf. the classic rules for such avoidance stated by Mr. Justice Brandeis in Ashwander v. Tennessee Valley Authority, 297, US 288, 341, 80 L ed 688, 707, 56 S Ct 466."

IV

CONCLUSION

From a reading of 31 Opinions of the Attorney General of California 55, cited in the Petition for Writ of Certiorari as Appendix "E" at page 21e, it can be readily seen that the attack upon the validity of the three annexations, either collectively or individually, can serve no substantial public purpose. The San Diego Harbor Tidelands Annexation was commenced at the request of a substantial number of property

owners outside the City interested in having the City annex the San Diego Harbor Tidelands area. The Western Salt Company Tract was annexed upon the petition of the property owner involved therein. The San Diego South Bay Annexation was commenced upon a proper petition being filed with the City of San Diego. These annexations obviously are separate and distinct annexations. No complaint has ever been filed with the City of San Diego by the owners of the land involved in the Western Salt Company Tract Annexation, nor does petitioner-appellant claim or allege that any such complaint has ever been recorded. It appears, therefore, that all parties are in fact satisfied with the validity of the first two annexations. The true position of the petitioner-appellant herein is that he would prefer to have had the area in which he owns property within the San Diego South Bay Annexation annexed by some other political jurisdiction, and have had the governmental services provided by another political jurisdiction. No public purpose can now be served by permitting one individual, who is a member of a substantially minority group opposing the initial annexation, to be permitted to harass respondent City of San Diego and the substantially majority landowners and residents of the South Bay annexation area by continued litigation.

Furthermore, a review of the authorities cited indicates that petitioner-appellant has made no showing which would indicate compliance with the policies and doctrines established in Rule 19 of the Rules of the United States Supreme Court.

It is, therefore, respectfully submitted that this Court should deny the issuance of a Writ of Certiorari to the District

Court of Appeal of the State of California, Fourth Appellate District.

Respectfully submitted,

ALAN M. FIRESTONE
Chief Deputy City Attorney

J. F. DU PAUL
City Attorney
Of Counsel

The Respondent CITY OF CORONADO joins in the foregoing brief.

JOHN R. GOODBODY
City Attorney for The City of Coronado

1124 San Diego Trust and Savings Building
San Diego 1, California

IN THE

Supreme Court of the United States

October Term 1960

No. 724

[illegible] Administrator of the Estate of [illegible] Deceased,

Petitioner and Plaintiff

vs.

[illegible] San Diego, a municipal corporation, [illegible] of the City of San Diego, and the City [illegible] Corporation, a municipal corporation, Councilmen City of Coronado,

Respondents and Defendants

PETITIONER'S CLOSING BRIEF FOR CERTIORARI

[illegible]

[illegible] Broadway

[illegible] Street

Los Angeles 13, California

[illegible]

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IN THE

Supreme Court of the United States

October Term, 1960
No. 724

LEE ROY HAZELTON, Administrator of the Estate of Charlotte Hazelton, Deceased,

Appellant and Petitioner,

vs.

THE CITY OF SAN DIEGO, a municipal corporation, Councilmen of the City of San Diego, and the CITY OF CORONADO, a municipal corporation, Councilmen of the City of Coronado,

Appellees and Respondents.

PETITIONER'S CLOSING BRIEF FOR CERTIORARI.

A. Petitioner Is Not Precluded From Raising a Question of Federal Law and Constitutional Concern Because It Arises Out of Subject Matter of Local State Concern Which Is Governed by State Law.

Petitioner is seeking a writ of certiorari to a State Court as against two State Municipal Corporations for violation of the fundamental charter.

Substantially all of the citations and arguments of said municipal corporations in opposition to certiorari

seek to prove a truism which needs no proof, *i.e.*, that certain matters of local State concern, are governed by State law.

Petitioner's quarrel with Appellees relates to the important federal question of whether a State Court may by finality of judgment, at the pleading stage, without a consideration of an aggrieved parties contentions, base a decision on non-federal grounds which has resulted in the evasion of constitutional issues, and whether the United States Supreme Court may remand to the State Court to permit the petitioner to assert and protect her Constitutional Rights.

Appellee's contention that the petition herein must be dismissed in the name of local practice, does violence to the following rule of law stated in the case of *Staub v. Baxley*, 2 L. Ed. 2d 302, 309, 355 U. S. 313:

> "At the threshold, appellee urges that this appeal be dismissed because, it argues the decision of the Court of Appeals was based upon state procedural grounds and thus upon an adequate nonfederal basis, and we are therefore without jurisdiction to entertain it. Hence, the question is whether that basis was an adequate one in the circumstances of this case. WHETHER A PLEADING SETS UP A SUFFICIENT RIGHT OF ACTION OR DEFENSE, GROUNDED ON THE CONSTITUTION OR A LAW OF THE UNITED STATES, IS NECESSARILY A QUESTION OF FEDERAL LAW; AND WHERE A CASE COMING FROM A STATE COURT PRESENTS THAT QUESTION, THIS COURT MUST DETERMINE FOR ITSELF THE AL-

LEGATIONS DISPLAYING THE RIGHT OR DEFENSE, AND IS NOT CONCLUDED BY THE VIEW TAKEN BY THE STATE COURT." (Caps. ours.)

First Nat. Bank v. Anderson, 269 U. S. 341, 345, 70 L. Ed. 295, and cases cited.

B. Municipal Jurisdiction Is Excluded by Article I, Section 8(17) of the United States Constitution.

In substance, the responsive brief of appellee Municipal Corporation declares that the State has willed, and the State has ordered, which is sufficient to stave off inquiry as to whether said municipal corporation has violated constitutional restrictions. No effort has been made to treat, much less refer, to the topic submitted by petitioner (Pet. Op. Br. pp. 20-28), wherein Petitioner has contended that the proceedings conducted by the City of San Diego were specifically prohibited and unauthorized by Article I, Section 8(17) of the United States Constitution.

Appellee's brief is completely silent upon petitioner's said contention and thereby has admitted that the attempted exercise of state and municipal jurisdiction over an area which by express provisions of the United States Constitution is lodged solely and exclusively in the Federal Congress, and an attempted use of said place for contiguity purposes is void. No attempt has been made to contradict such averment by the appellees in opposition to petition for writ of certiorari. Admittedly then, a Municipal Corporation cannot assert political jurisdiction within an area where exclusive jurisdiction is reserved to the Federal Congress. This

Court has a special responsibility to be particularly mindful of the respective boundaries between state and federal authority.

C. A State by Unequal Protection of the Law and Lack of Due Process Cannot Deprive Petitioner of Access to Ask for an Adjudication on Factual Issues Determinative of Want of Jurisdiction, in Violation of Federal Rights.

Appellee has defended constitutional infringements on the ground that the franchise, corporate existence and the powers of municipalities are exclusively matters of local concern. This petition for certiorari has not been presented to test the franchise of the respondent Municipal Corporation whose corporate existence has been brought to task, but *concerns itself with an ordinance passed by the City Council* on a question of its jurisdiction affecting property and personal liberties.

In the case of *Sharkey v. Butte*, 52 Mont. 10, 155 Pac. 266, the Court said:

> "It may be that, as matter of public policy, a private citizen will not be heard to call in question the City's proceedings for minor irregularities or informalities; but where such proceedings are void ab initio for want of jurisdiction of the subject matter, as here, equity will afford relief to the property owner whose taxes would be increased if his property were included within the cities limits."

In *Stoltman v. Clayton* (1920), 205 Mo. App. 568, 226 S. W. 315, conceding that the corporate existence of a municipality or the validity of its charter is open

to suit only by the State in the nature of *quo warranto* or other direct proceedings, the Court declared that the extension of the boundary lines of a municipal corporation would not be raised to the dignity of an original act of incorporation . . . and the question of whether it is void was the subject of judicial inquiry and that "it was proper for the learned trial Judge to give plaintiff his day in Court. . . ."

In the case of *Harvey Canal Land & Improvement Co. v. Gelbke* (1928), 166 La. 896, 118 So. 75, involving an annexation ordinance already passed by the municipality, it was held that the plaintiffs were entitled to maintain an action to have the question determined whether the ordinance was reasonable.

Still another issue to be determined on the merits by the California State Court in the case at bar, upon remand by the Supreme Court, is the question of whether when the action was instituted there was any material change of position on the part of the municipality, at which point private parties may intervene without *quo warranto*, and whether in fact any material expenditures were made for the benefit of the illegally annexed territory, and whether there had been a *de facto* exercise of authority in the territory prior to suit.

The recognized exception to the general rule that private individuals are without capacity to attack the alteration of municipal limits or bounds, *i.e.*, the view being taken by the petitioner in the case at bar, in her pleadings before the State Court, that the act of municipal boundary alteration is void, are sustained in the following cases:

Attorney General of the State of California

See Opinion, Appendix E p. 21(e) appellants' petition for writ of certiorari herein.

Delphi v. Startzman, 104 Ind. 343, 3 N. E. 937;

Pascagoula v. Krebs, 151 Miss. 676, 118 So. 286;

Barton v. Stuckey, 121 Okla. 226, 248 Pac. 592;

Mo. R. Co. v. Maltsberger, 189 Okla. 363, 116 P. 2d 977;

Waco v. Higginson, 226 S. W. 1084, revd. on other grounds;

Red River v. Grand Forks, 27 N. D. 8, 145 N. W. 726;

Ocean Beach Heights, Inc. v. Brown-Crummer Inv. Co., 58 S. Ct. 385, 302 U. S. 614.

D. A State Municipal Corporation May Not Violate Constitutional Rights by Purposely Doing Indirectly That Which It Cannot Do Directly.

Petitioner's brief in opposition to the Petition for Writ of Certiorari is completely silent upon the allegation that three interdependent annexations were calculatedly manipulated to deprive the aggrieved parties of notice, and instead persist in referring to each piecemeal, by avering that no single annexation of itself deprived petitioner of notice. No issue has been proffered by Appellees brief in opposition to the petition for writ of certiorari that the said annexations constituted one transaction, illegally divided into three proceedings to procure a non-contiguous territory, without an opportunity to make timely objections, in denial of the equal protection of the laws, and denial of due process.

"Engrained in our concept of Due Process is the requirement of notice. Notice is sometimes essential so that the citizen has the chance to defend charges. NOTICE IS REQUIRED BEFORE INTERESTS ARE DISTURBED, BEFORE ASSESSMENTS ARE MADE, BEFORE PENALTIES ARE ASSESSED. Notice is required in a myriad of situations where a penalty or forfeiture might be suffered for mere failure to act. (Citing cases.)

Lambert v. California, 355 U. S. 225, 2 L. Ed. 2d 228, 231.

E. The Question Raised by Appellee That Political Jurisdiction of a Municipal Corporation May Extend Across Navigable Waters Is Not a Matter of Essential Determination in the Case at Bar.

The brief filed by Appellees has raised an issue on the proposition that California State law permits the annexation by a Municipal Corporation of navigable waters. An entire topic is devoted by Appellee to the proposition that political jurisdiction may extend across reaches of navigable areas. In all of the cases referred to by said respondent Municipal Corporation to substantiate said contention there existed contiguity, in contradistinction to the case at bar wherein contiguity to respondent Municipal Corporation is alleged as nonexistent, either by navigable waters or otherwise. Neither side in the case at bar contends that annexation of non-contiguous territory is anything but void, and a usurpation of jurisdiction. Why then cannot the question or issue of contiguity or lack of contiguity be litigated in the State Court?

The principle of *res adjudicata* which Appellee refers to as applying to Petitioner in the case at bar, as enunciated in the case of *Forsyth v. City of Hammond*, 166 U. S. 506 (Resp. Br. p. 24), wherein the Supreme Court of Indiana held an annexation valid is inapplicable in the case at bar because said case presupposed that a trial upon the merits was held, due process complied with, the equal protection of the laws administered, and no conflict with exclusive congressional legislative jurisdiction was involved. The authority thus cited is clearly inapplicable in this pending matter, wherein a hearing upon the merits is sought and federal contentions and points of law are being raised for judicial inquiry, and for a consideration thereof on the merits by the State Court.

F. The Issues Are of Public Importance.

Despite the obvious violation of the State laws, affirmative requirement of contiguity as a condition precedent to a valid annexation of territory by a Municipal Corporation, and the conceded contention by all parties that without such contiguity, annexation proceedings are void *ab initio*, giving rise to a justiciable controversy, the Respondent Municipal Corporation now contends that the question of federal law and concern, *i.e.*, what notice is necessary which is reasonably calculated to inform parties of proceedings affecting their legally protected interests, is not important because the Petitioner has not been deprived of property, and that there is nothing in the federal constitution which protects the Petitioners from the burdens of local illegal taxation.

This contention of respondents is not settled nor clearly defined as they have expressed in their briefs, and in fact on this very issue the California Supreme

Court rendered a divided opinion in the case of *People v. City of Palm Springs*; 51 Cal. 2d 38, wherein the majority opinion stated, at page 47:

> "*Plaintiff contends that the annexation will operate to take property without due process of law.* No one has a vested right to be either included or excluded from a local government unit, and the fixing of territorial boundaries of a municipal corporation will not ordinarily constitute an invasion of federal constitutional rights. (Hunter v. City of Pittsburg, 207 U. S. 161, 178-179; Forsyth v. Hammond, 166 U. S. 506; Kelly v. City of Pittsburgh, 104 U. S. 78."

Thus the majority opinion of the California Supreme Court has taken the rigid posture that before complaint may be taken of arbitrary unconstitutional conduct it is essential that a vested property right be infringed upon.

However, the minority in said opinion not only referred to the United States Supreme Court cases above cited, but pointed out, that in the case of *Myles Salt Co. v. Iberia etc. Drainage Dist.*, 239 U. S. 478, the United States Supreme Court reversed the sustaining of a demurrer to restrain a tax sale of land which had been included in a drainage district and that the Court therein instead of perusing the vested property rights doctrine of being included or excluded from the drainage district, looked to the illegal and objectionable acts of the political body involved: at page 50 of said minority opinion it is stated as follows:

> "The Supreme Court held this was an act of confiscation and violative of the Fourteenth

> Amendment. At page 481 the Court said the delegation of power to include the land in the district was valid but its use which is 'palpably arbitrary and a plain abuse' is illegal." . . . "I can see no difference between including land arbitrarily in a special district and in a municipality."

It thus appears, that in California at least, this important question should be settled by this Honorable Court.

It must be made clear, that the action is not at the instance of one individual, but is a representative suit wherein by virtual representation hundreds of persons and entities are before the Court. Appellee has pointed out in its brief that 585 persons voted against annexation (p. 3, line 30), and the instant action extends not only to the area of San Diego but in principle is of national concern, and requires uniformity of decision not only for the prevention of multiplicity of actions in relation to the City of San Diego's actions in the area, but with relation to burgeoning expansion of other cities in relation to Federally owned property wherein legislative jurisdiction is retained. It is in the public interest that any conflicts be heard, resolved, and completely and finally determined in one proceeding rather than permitted to remain suspended by state official actions which cannot conclusively dispose of the matter, inasmuch as the final authority rests in the Federal Government under the United States Constitution.

Respectfully submitted,

MANUEL RUIZ, JR.,
Attorneys for Petitioner.

ALEXANDER RUIZ,
Of Counsel.